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HARVA  ARY

VERMONT, SUPREME COURT

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF THE
STATE OF VERMONT

BY
GEORGE M. POWERS

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JUDGES
OF THE
SUPREME COURT OF VERMONT
DURING THE TIME OF THESE REPORTS.

HON. JOHN W. ROWELL, CHIEF JUDGE,

HON. JAMES M. TYLER.

HON. LOVELAND MUNSON.

HON. HENRY R. START.

HON. JOHN H. WATSON.

HON. WENDELL P. STAFFORD.

HON. SENECA HASELTON.



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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF VERMONT

TOWN OF MT. HOLLY *v.* L. F. FRENCH.

May Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed August 27, 1902.

Collector of taxes—Proceedings for extent—Formalities required.

A written petition is not necessary in proceedings under V. S. 517 for an extent against a delinquent tax collector.

PETITION for an extent appealed by the plaintiff from the judgment of a justice of the peace. Trial by Court at the September Term, 1901, Rutland County, *Start*, J., presiding. Judgment for the plaintiff. The defendant excepted.

Butler & Moloney for the defendant.

The petition must show that the collector's neglect is unlawful and must contain all the averments necessary to show that fact. This petition omits several necessary averments and does not show that this collector had a lawful warrant in

proper form issued by a person having lawful authority. *Ferrisburgh v. Birkett*, 60 Vt. 332; *Lynde v. Dummerston*, 61 Vt. 51; *Miles v. Albany*, 59 Vt. 81; *Rowell v. Horton*, 57 Vt. 31.

Joel C. Baker for the plaintiff.

The remedy against a delinquent collector and the method of procedure is purely statutory. It is summary and rigorous. No petition is required by the town treasurer to the justice, and no pleadings or issues are provided for. The only process is a citation to show cause, and if it appears that the collector has not performed his duty, an extent must issue. V. S. 578. No petition being required an informal one is sufficient.

TYLER, J. The plaintiff's treasurer preferred a petition to a justice of the peace alleging that Oct. 27, 1897, as such treasurer, he issued his warrant against the delinquent tax payers of said town for the amount of their taxes upon the grand list of said town for that year, and delivered it to the defendant, collector of taxes for the town, to be by him collected and paid over to the treasurer, agreeably to the provisions of law, the amount being \$1,136.74; that the defendant, as collector, had not performed, according to law, the trust committed to him, but was in arrears upon said warrant for the sum of \$736.74, for which amount the defendant was accountable; that the amount had been demanded of him, and that the defendant had neglected and refused to pay it. The petitioner prayed that an extent might be issued against the goods, chattels and estate of the defendant for the amount of the arrearages, according to law, and that for want thereof his body might be taken and committed. Pursuant to the petition the justice summoned the defendant before him to show why an extent should not be issued as prayed for. A hearing was had, and the justice adjudged that an extent ought not to be granted, and the plaintiff appealed to the County Court. The case was tried by the

judges in the County Court, who found that the defendant had not paid the taxes in full, and that he was in arrears in the sum of \$736.34, and directed that an extent issue against him for that sum with costs. On the trial in the County Court the defendant objected to all evidence offered by the plaintiff in support of the petition but the Court received such evidence and found therefrom the facts reported, to which the defendant excepted, and the case comes here upon those exceptions.

The grounds of the defendant's exceptions are that the petition does not allege that the warrant issued to the defendant was in due form, nor that it was properly signed; that it does not allege directly that French was collector of taxes that year, nor that he was therein commanded to collect the taxes, nor that the warrant was for all the taxes payable to him, nor that he accepted the warrant; that there is no allegation that the selectmen had delivered to the town treasurer the warrant provided by law, nor that the treasurer had put himself in a position authorizing him to issue the warrant to the collector of taxes, or to command him to make collection thereof.

V. S. 517 provides that: "Any collector who unlawfully neglects to collect and pay over a tax delivered to him, shall be accountable for such tax or the arrearages thereof, to the treasurer, selectmen, trustees, committees or other persons authorized to receive the same, and they may cite him to appear before a justice residing in an adjoining town, to show cause why an extent should not be issued against him for such arrearages and the costs of such proceedings."

The history, nature and effect of extents is fully and ably elucidated in the opinion of the court in *Hackett v. Amsden*, 56 Vt. 201. The writ seems to have taken its name from the fact that the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff. 1 Bouv. Law Dict. 635. In 8 Ency. Pl. & Pr. 784-5, it is said

that at the English common law by this writ the defendant's body, lands and goods may all be taken at once to compel payment of a debt; that in several of the states of this country it is employed to give the creditor possession of the debtor's land for a limited time till the debt is paid. In *Hackett v. Amsden* the Court said: "Under our statute an extent may be likened to an extent in chief in England. It is, so to speak, *prerogative process*, affording a summary remedy for recovering public revenue from public officers who have committed a breach of public duty, and in case of state taxes for recovery from the inhabitants of the town as well. No notice is given to show cause against the state treasurer's extent. In the words of PARKER, C. J., in *Waldron v. Lee*, 5 Pick. 328, 'the wheels of government cannot be stopped to hear complaint.'"

The collection of taxes is so important for the payment of the ordinary expenses of towns and for the maintenance of the state government, that it is obviously necessary that power shall reside with some court to institute summary proceedings against collectors of taxes who refuse or neglect to perform their duty. Without such power, the whole machinery of government might be greatly embarrassed. Our statute has provided the means by which this duty may be enforced; not, indeed, without a hearing, for the delinquent is, in the first instance, only cited to appear before a justice and show cause why an extent should not be issued against him. He has his day in court, but as was held in *Re Hackett*, 53 Vt. 354, the proceedings are not *inter partes*, but rather in the nature of criminal proceedings. The defendant has not a right to trial by jury, the statute not according that right. *Griswold v. Rutland*, 23 Vt. 324. He has, however, full opportunity to meet the charge against him and convince the justice that he is not in default.

Until the Act of 1797 was passed, an extent could be issued without notice to the delinquent collector, and prior to the Act of 1880 an appeal was not allowed him, and even now the state treasurer issues his extent without previous notice or other proceedings.

If it were necessary that the petition should contain the allegations that the defendant contends for, it would follow that the treasurer must, before applying for an extent, ascertain the existence of the facts to be alleged, which evidently is not the intent of the statute. It is sufficient for him to know and state the facts that are set forth in the petition in question.

But it is needless to consider what facts the petition must allege, for, though it is an orderly step in the proceedings to prefer a written petition to the justice, the statute does not in terms require it. It is a strict compliance with the statute if the treasurer cites the collector to appear before the justice to show cause, etc.

The exception to the ruling of the Court excluding certain evidence is not insisted upon in the defendant's brief, and is not considered.

Judgment affirmed.

TOWN OF CLARENDON v. RUTLAND RAILROAD CO.

January Term, 1902.

Present: ROWELL, TYLER, MUNSON, WATSON and STAFFORD, JJ.

Opinion filed August 27, 1902.

*Overhead crossing—Duty to maintain—Railroad charter—
Power of legislature—Constitutional law—Dedication
and acceptance of highway—Evidence—Questions for
jury.*

Upon the question whether a certain road from a farm house to the main highway had been dedicated as a public highway when a railroad was built across it, evidence that such farm buildings had stood there more than a hundred years, that the only way of going to and from them to the main highway was by this road, that it existed before the railroad was built, that it was fenced and kept open for public travel, and that the public used it as there was occasion, is admissible, and sufficient to sustain a finding of such dedication.

In connection with these facts, evidence that the highway surveyors, by direction of the selectmen, had kept this road in repair, that the defendant, many years ago, removed an overhead bridge on it and replaced it with a more substantial one, that it was used as a public highway prior to 1847, is admissible, and tends to show an adoption of the road on behalf of the town.

The legislature cannot grant authority to a railroad company to construct its road without regard to the rights of other persons and corporations. and the provisions in the charter of a railroad company requiring that the railroad shall be so constructed that when it crosses a highway, it shall not impede or obstruct the safe or convenient use of the same, and that, if a highway is raised or lowered in its construction, such alteration shall be made to the satisfaction of the selectmen of the town, require the company to maintain, as well as construct, an overhead crossing made necessary by lowering a highway in the construction of the railroad.

Were this not so, the legislature would have the power to impose this additional burden upon the company,—as is done by V. S. 3844,—it being a valid exercise of the police power inherent in the State.

Nor do the provisions of V. S. 3846 amount to the taking of the company's property without due process of law, since it provides for notice to the company, and gives it an opportunity to perform the work before the town can do so at the company's expense.

ASSUMPSIT under V. S. 3846. Plea, the general issue. Trial by jury at the September Term, 1901, Rutland County, *Start*, J., presiding. Defendant's motion for a verdict overruled. Judgment, *pro forma*, for the plaintiff, on special findings by the jury. The defendant excepted.

Frederick H. Button and *William H. Button* for the defendant.

A highway surveyor cannot accept a dedication on behalf of the town, without directions from the selectmen. *Hyde v. Jamaica*, 27 Vt. 443; *Folsom v. Underhill*, 36 Vt. 580. Use of a road for public travel with knowledge on the part of the selectmen will not amount to an acceptance. *Bailey v. Fairfield*, Brayt. 128; *Hyde v. Jamaica*, *supra*; *Blodgett v. Royalton*, 14 Vt. 290; *Tower v. Rutland*, 56 Vt. 28.

V. S. 3846 does not apply to the defendant corporation. The charter of the Champlain & Connecticut River Railroad Co., to whose rights the defendant succeeded, provided that the company should be "seized and possessed" of lands acquired by condemnation,—as this land was. Acts of 1843, No. 54, s. 7.

The company was given authority to raise or lower a highway, and make such alteration to the satisfaction of the town. *Id.* s. 14. The charter was not subject to future legislation by its terms, and was a contract which the State could not impair. *Dartmouth College v. Woodward*, 4 Wheat. 518; *Pingrey v. Washburn*, 1 Aik. 264.

The statute applied to this defendant, deprives it of its property without process of law.

Butler & Moloney and *George E. Lawrence* for the plaintiff.

The road in question was a public highway by dedication and adoption. A series of acts by the officers of the town is sufficient to show an adoption. Angell on High. 114-135; Greenl. Ev. 159; *Pratt v. Swanton*, 15 Vt. 147.

The evidence shows that the road existed as an open, public road and the only means of getting to the buildings on the Smith farm for over a hundred years, which with the evidence that the defendant recognized it as a public highway by building and maintaining the bridge, and that the highway surveyors expended the money of the town upon it by direction of the selectmen, is sufficient to establish its character as a public highway.

TYLER, J. Assumpsit, under V. S. 3846, to recover the amount expended by the plaintiff in building a bridge upon an alleged highway that extends across the defendant's railroad in said town.

The defendant, in the year 1848, under a charter granted by the legislature in the year 1843 to the Champlain and Connecticut Railroad Co., to whose franchises it succeeded, by condemnation proceedings acquired a right of way five rods wide, running in a northerly and southerly direction through the town, crossing the farm of Enoch Smith, and built its railroad upon it. On the east side of the five rods was a main highway of the town, called the "East Road," running in the same general direction with and near the railroad.

The buildings upon the Smith farm were west of the railroad, which was constructed in a cut opposite said buildings, so that an overhead crossing was necessary for persons and teams to pass between the buildings and the East Road, and a crossing was constructed by the railroad company for that pur-

pose. The condemnation proceedings included the location of the crossing and the approaches to it.

There was no record evidence that a highway was ever laid out or surveyed between the Smith buildings and the East Road, nor that the defendant, nor its predecessor, ever took any corporate action in respect to a dedication of the premises to the public as a highway; but it appeared that the defendant maintained a crossing there until a short time before the present bridge was built, when the defendant tore it down by reason of its unsafe condition.

The jury were not required to return a general verdict, but they found by special verdicts that the highway in question was a public highway when the plaintiff notified the defendant to rebuild the bridge; that it was a public highway at and before the time the railroad was built through the Smith farm; that the plaintiff's selectmen adjudged that it was necessary to rebuild the bridge and so notified the defendant, and that the sum expended in rebuilding it was reasonable.

I. The first question presented by the exceptions is whether the plaintiff's evidence tended to show that at the time the railroad was located and built it was extended over a then existing public highway at the point in question, or whether the court should have directed a verdict as moved by the defendant.

As this road was not laid out and opened in the manner provided by the statute, the question is whether there was a dedication to the public and an acceptance by the town; for it is well settled that neither a dedication of land to the public for a highway, nor the use of it as such by the public, is sufficient to impose upon a town the duty to keep it in repair, unless it has been accepted and adopted by the proper town officers. An intention to adopt the road as an existing highway must be manifested by acts of the town authorities. *Pratt et al. v.*

Swanton, 15 Vt. 147; *Hyde v. Jamaica*, 27 Vt. 443; *Folsom v. Underhill*, 36 Vt. 580; *Tower v. Rutland*, 56 Vt. 28.

In *Folsom v. Underhill*, the court laid down this rule: "The opening of a road by the land owners to public use, and its use by the public without interruption, and the allowance by the land owners of repairs upon it at the public expense, are facts which would tend strongly to show the intention to dedicate the land by the land owners to the use of a public highway. If this intention was unequivocally manifested, the dedication, so far as the owners of the soil were concerned, was complete; and, if the land was accepted and used by the public in the manner intended, the owner and all claiming in his right would be precluded from asserting any ownership inconsistent with such use."

In the present case the Court instructed the jury in accordance with the well established rules, that there must have been an intention by the land owner to dedicate, a manifestation of that intention by his acts, and an acceptance or adoption by a majority of the selectmen.

The plaintiff's evidence tended to show that the buildings on the Smith farm had occupied the place where they now stand for more than a hundred years; that the only way of going from them to the main highway and returning was by this road, and that it was in existence before the railroad was built. These facts and the fact that the road was fenced and kept open for public travel, and that the public used it as there was occasion, were evidence from which the jury were warranted in finding both an intention to dedicate and the act of dedication by the land owner.

We think the evidence tends to show an adoption of this road by the town. The witness Crossman testified that he was eighty-four years old, and had lived upon a farm adjoining the Smith farm since he was two years old; that the Smith

house was apparently old when he first knew it; that he had known the road as long as he could remember; that it was bounded by old stone walls, and had always been a public road; that it was in existence before the railroad was built, and that the railroad company built a trestle bridge over its track so the public could continue to use the road; that he was highway surveyor before the railroad was built; that the selectmen gave him tax bills with directions to repair "all the roads" in his district, which he understood included this one, because it was one that "they usually kept in repair." He had reason to remember that he repaired the road the year the railroad was built, because, as he says, it got out of repair by stone being drawn over it for use in building the railroad, and that he was directed by the selectmen to lay out more money upon it than was upon the tax bill. His testimony tended to show that in the year the railroad was built, and in previous years, as highway surveyor he received tax bills from the selectmen, which included this road, that he expended money upon it, as upon other roads and returned the tax bills to the selectmen. This evidence was properly admitted. Crossman's testimony also tended to show that in 1862 or 1863 the railroad company removed the trestle bridge, and built a new one in its place, with stone abutments, which was removed by the defendant, and replaced by the plaintiff by the bridge in controversy.

Another witness who was born in the Smith house in 1830, testified that he knew this road prior to 1847, and that it was then fenced and used as a public highway. All this evidence was properly admitted as tending to show that this road was a public highway by acceptance and adoption by the plaintiff town, and it was not error to submit the question to the jury.

2. The defendant makes the further point that its whole duty was performed when it had constructed the original crossing to the satisfaction of the selectmen, and that it did not owe the

town the duty of maintaining it. This claim renders it necessary to examine the company's charter. Section 14 is as follows: "If said railroad shall cross * * * any canal, highway, or turnpike, the same shall be so constructed as not to impede or obstruct the safe and convenient use of such canal, highway, or turnpike, and said corporation may raise or lower such turnpike, highway, or private way, so that said railroad, if necessary, may pass under or over the same. And if said corporation shall raise or lower any such turnpike, highway, or private way, and shall not so raise or lower the same, as to be satisfactory to the proprietors of said turnpike, or to the selectmen of the town in which said highway or private way is situated, said proprietors, or selectmen, may require, in writing, of said corporation, such alteration or amendment as they may think necessary; and if the required amendment or alteration be reasonable and proper, and said corporation shall unnecessarily neglect to make the same, such proprietors or selectmen may make such alteration and amendment, and may prosecute to final judgment and execution, in any court proper to try the same in an action on the case against said corporation, and shall therein recover a reasonable indemnity in damages, for all expenses occasioned by making such alteration, with costs of suit. * * *"

While the charter provided that the railroad company should be "seized and possessed" of the lands acquired by the condemnation proceedings, the grant was made with reference to existing rights of towns through which its road passes, and with the evident intention of the legislature to protect those rights.

The defendant's duty to construct an overhead crossing for the use of the public when it built its road is conceded, provided the highway was then existing. The language of the charter, requiring that the railroad should be so constructed that when it crossed any highway it should not *impede or ob-*

struct the safe and convenient use of such highway, implies the maintenance of a crossing for the use of the public in connection with the road in question. If the crossing were destroyed, travel over the highway would be impossible.

The charter requires the building of the crossing in connection with the construction of the railroad. The raising or lowering of the highway, so that the railroad may pass under or over it, is made a part of the construction of the railroad, and the railroad and the crossing are to exist together so that the public may continue to use the highway. The charter makes no intimation that the burden is to be shifted from the railroad company to the town in case the crossing should be destroyed or become out of repair and impassable. We hold, therefore, that it was the railroad company's duty under its charter to construct and maintain a crossing at the point in question. This is the only reasonable construction of section 14. V. S. 3844-5-6 impose no duty upon the company beyond what the charter requires. These sections only provide a more specific remedy, when railroad companies are in default of their duty, than was provided by the charter. The later acts relate to the remedy rather than to the liability. *People v. Cooper*, 6 Hill, 516.

3. But if the charter were construed to mean that the company had performed its whole duty when it made the overhead crossing, and that the duty to rebuild was not required, the legislature had a right to impose additional burdens upon it. These sections had their origin in No. 26, Acts of 1852. Section 3844 provides that when a railroad company has constructed a railroad across a public highway by passing upon, over or under the traveled path thereof, the corporation shall keep in good and sufficient repair, and rebuild when necessary, bridges, culverts, crossings, and other constructions made for

the accommodation, safety and convenience of the public travel on the highway, over, under or upon such railroad. * * *

By section 3845, the liability of the corporation continues although the railroad has been abandoned, unless the selectmen of the town, in writing, consent that the company be released therefrom.

V. S. 3846 reads: "If the selectmen of a town in which such crossing is located are of opinion that such bridge, culvert, crossing, or other constructions require repairing or rebuilding in order to be safe for travel thereon, they may notify the corporation, required by this chapter to repair or rebuild the same, by leaving a written notice to that effect with the president, superintendent of such road, or the clerk of said corporation. And if such corporation does not repair or rebuild the same for one month after such notice, the town may do so and recover the expense thereof of the corporation, in an action of general assumpsit for work and labor done, with costs." It was not within the scope of legislative authority to grant to the company a right to construct and operate its road without regard to the rights of other persons and corporations. It is a settled principle that every holder of property, however absolute his title, holds it under the implied liability that his use of it shall not be injurious to the enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to general regulations made by the legislature, under its police power, for the common good and general welfare. *Cooley's Con. Lim.*, (6th ed.) ch. 16; *Commonwealth v. Alger*, 7 Cush. 53. REDFIELD, C. J., said in *Thorpe v. R. & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625: "By this general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state." In respect to impairing the obliga-

tions of contracts, he said: "All contracts and all rights * * * are subject to this power; and not only may regulations which affect them be established, * * * but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change * * *." The subject of legislative control over corporations is exhaustively discussed in this opinion and the case is often referred to by courts and law-writers as a leading authority. It is there declared that the essential franchise of a railroad company is the right to operate its road and receive fare and freight; that the entire power of legislative control is reserved unless expressly, or by necessary implication, restricted in the charter; that the corporation takes nothing by intendment but what is necessary to the enjoyment of what is expressly granted; and a quotation is made from Chief Justice MARSHALL'S opinion in the Dartmouth College case, 4 Wheat. 518, that, "a corporation is an artificial being—the mere creature of the law—it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

The question in the Thorpe case was whether the defendant was bound by the provision in the general railroad act of 1849, which required railroad companies to construct and maintain cattle guards, there being no such obligation imposed upon the defendant by its charter, and it was held that it was within the scope of the police power of the State, through the legislature, to make such requirement; that this power extends to the regulation and control of the entire business of railroads; that while the powers expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporation are inviolable, beyond this the entire power of control resides in the legislature unless such power is expressly limited.

This subject is considered in 19 Am. & Eng. Ency. (1st ed.) 884, and it is there said to be settled that the construction and operation of a railroad is a business "affected with a public interest," so that the State has a right to control and regulate it. Among the cases cited in the notes are *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. R. Co. v. Cutts*, 94 U. S. 155-164, 183-187; *Peik v. Chicago etc. R. Co.*, 94 U. S. 164.

That railroad corporations hold their property and exercise their functions subject to legislative control is beyond question. The price for transporting freight and passengers, within certain limitations, the speed of trains, the way in which they may cross or run upon highways or turnpikes, are all within the power of the legislature to regulate, although the power to alter and amend the charters has not been reserved. This was held in *People v. Boston, etc. R. Co.*, 70 N. Y. 569. This is upon the ground that such corporations exercise their franchise for the public benefit, and are subject to regulation by the power that created them; that it is a part of the police power which is inherent in every government, with such limitations only as are provided by the State and Federal Constitutions. 19 Am. & Eng. Ency., (1st ed.) 885.

It was held in *St. Louis & San Francisco R. Co. v. Matthews*, 165 U. S. 1, that a Missouri statute making every railroad corporation in the State liable for all property injured or destroyed by fire from its locomotives, was constitutional and valid, and neither violated any contract between the State and the railroad company, nor deprived the company of its property without due process of law. Statutes requiring railroad companies to keep watchmen at points where roads intersect and at other dangerous places; imposing penalties for delay in transporting goods; for not keeping ticket offices open an hour before the departure of trains; prescribing the time that trains shall stop at certain stations and at points where roads cross

each other; prohibiting the use of stoves and furnaces for heating cars; requiring the lighting of cars in certain stations; prohibiting the running of cars by steam through cities; requiring the erection of stations and depots at certain points, and numerous other statutory regulations and requirements, have been upheld as constitutional and not impairing the obligations of contracts. A case much in point is *Boston etc. R. Co. v. County Comrs.*, 79 Me. 386, 10 Atl. 113, 32 Am. & Eng. R. Cas. 271, which upholds a statute requiring that the expense of maintaining so much of the highway as is within the limits of the right of way where the track is crossed at grade, shall be borne by the railroad company.

Upon all the authorities, and upon the principle that railroads must be run in such a manner as will be for the public benefit as well as for the interest of the companies, this statute must be held valid.

Nor can it be maintained that the action of the town was the taking of the defendant's property without due process of law. The selectmen, indeed, decide when it is necessary to rebuild or repair the crossing, but they must notify the railroad company and give it an opportunity to perform the work, and it is only upon the company's default that the town may rebuild or repair, and have an action of assumpsit to recover the amount expended. In this case the court submitted to the jury to find what amount was necessarily expended by the town in rebuilding the crossing. Every constitutional right of the defendant was fully protected.

Judgment affirmed.

STATE v. ANDREW THORNBURN.

May Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON and
HASELTON, JJ.

Opinion filed August 27, 1902.

Sale of fermented cider—Stare decisis.

The only reasonable construction of V. S. 4460 and 4463, considered together, being the one adopted in *State v. Waite*, 72 Vt. 108, that decision must stand.

INFORMATION for selling cider contrary to law. Plea, not guilty. The respondent was adjudged guilty on facts conceded at the December Term, 1901, Windsor County, *Stafford*, J., presiding. The respondent excepted.

J. G. Harvey for the respondent.

Chas. P. Tarbell, State's Attorney, for the State.

TYLER, J. Information for selling cider without authority. The State offered to prove, and the respondent admitted ten sales of fermented cider, and the court thereupon adjudged the respondent guilty of ten offenses, but allowed exceptions and suspended sentence. In this court the respondent concedes that the judgment below was in accordance with *State v. Waite*, 72 Vt. 108, 47 Atl. 397, but contends that the decision should be overruled.

In *State v. Waite* it was held that, as V. S. 4460 classified fermented cider with intoxicating liquors, the permission given in section 4463 to sell cider, related to unfermented cider. This is the only reasonable construction of the two sections considered together,—the only way to give effect to both sections. The doctrine of *stare decisis* must be applied.

Judgment that the respondent take nothing by his exceptions; let there be sentence and execution thereof.

IN RE EPHRAIM F. CLAFLIN'S WILL.

May Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON and
HASLTON, JJ.

Opinion filed August 28, 1902.

*Wills—Execution—Nullification of exception—Evidence—
Relevancy.*

An exception to the exclusion of testimony when first offered is nullified when, after cross-examination on that point, full re-examination thereon is allowed.

Upon the issue as to the legal execution of a will, the testimony of a person that he, with two others, witnessed a former will of the testator, that the testator then asked them to come in and sign, which they did, and were all present when they signed, and of a judge of probate that before the will in question was made, many wills drawn by the testator had been admitted to probate in his court, is too slightly relevant to make its exclusion error.

Upon such issue, evidence that, prior to the execution of the will in question, the testator drew and superintended the execution of a will, and directed the witnesses to see each other sign and to look and see the testator sign, but did not say in words that this was necessary, is admissible.

Former statements and testimony of attesting witnesses to a will, in conflict with their present testimony, can be used only for the purpose of impeachment.

It is not necessary, under our statute, that the witnesses to a will should know the character of the instrument which they are attesting.

It is sufficient if the witnesses to a will are together in the presence of one another in such a way that they could see one another sign, whether they actually looked and saw or not.

APPEAL from a decree of the Probate Court establishing an instrument as the will of Ephraim F. Claflin. J. H. Bass and Orra Bass, proponents. Elmer E. Claflin and Bertha L. Blanchard, contestants. Trial by jury at the June Term, 1901, Orange County, *Stafford*, J., presiding. Verdict for the contestants. The proponents excepted.

J. D. Dennison and *R. M. Harvey* for the proponents.

To show knowledge, learning, skill or capacity in the person who made and superintended the execution of this will, is certainly legitimate. *Winchelsea v. Wanchope*, 3 Russ. 441; *Roberts v. Welch*, 46 Vt. 164.

The proponents offered to show what was said and done by and under the direction of the testator at the time of the execution of various wills which he had, before the date of the will in question, drawn. For the purpose of making it more certain that the decedent knew the legal requirements at the time he made and superintended the execution of the will in question, the evidence should have been received.

No formal publication of a will is necessary. The testator's act of writing the will and the attestation clause, coupled with the fact that he was of sound mind, is a sufficient publication. It is not even necessary that the witnesses should know, at the time they sign, that the document is a will. *Redfield on Wills*, 213-222; *Trustees v. Calhoun*, 25 N. Y. 422; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Haynes v. Haynes*, 33 Ohio St. 598; 1 *Williams on Exrs.* 144-147; *Dean v. Dean*, 27 Vt. 746; *Osborn v. Cook*, 11 Cush. 532.

The statement of the attesting witnesses, made out of court, should have been received as evidence of their knowledge

of the character of this instrument. *Beadles v. Alexander*, 2 Am. Pro. R. 173; *Boone v. Lewis*, 103 N. C. 40; *Cheatham v. Hatcher*, 30 Gratt. 56; *Colvin v. Warford*, 20 Md. 357.

The charge in regard to the witnesses being in the same room is, to say the least, incomplete. *Blanchard v. Blanchard*, 32 Vt. 62; *Mandeville v. Parker*, 17 C. L. J. 442.

M. M. Wilson and Darling & Darling for the contestants.

The offer of the proponents to show the testator's conduct on the execution of certain wills was properly rejected. The only fact such evidence could directly prove, was the proper execution of those other wills. To enter upon the trial of such immaterial issues would divert the minds of the jury from the real issue involved, prolong the trial indefinitely, and defeat rather than promote justice. *Foster's Exrs. v. Dickinson*, 64 Vt. 248; *Weeks v. Lyndon*, 54 Vt. 638; *Bateman v. Rutland*, 70 Vt. 500.

The evidence offered concerned and brought into the case transactions similar to, but unconnected with the transaction on trial, and therefore such evidence comes under the ban of the rule announced in Article 10 of Stephen's Digest of Evidence.

Again the evidence offered was inadmissible because it was an attempt to base a presumption on a presumption. *Hammond's Admr. v. Smith*, 17 Vt. 263; *Richmond v. Aiken*, 25 Vt. 326.

The witnesses must know the character of the instrument which they are attesting. *In Re Claflin's Will*, 73 Vt. 133; *Roberts v. Welch*, 46 Vt. 164; 1 Redfield on Wills, 220, 224, 238, and notes.

The instruction regarding the use of former inconsistent statements made by the witnesses to the will was correct. *Thornton's Exrs. v. Thornton*, 39 Vt. 122.

RŌWELL, C. J. The proponents showed by various witnesses, each testifying to one or more instances, that before the time in question, the testator drew quite a number of wills for other people, and superintended their execution. They offered to show that in several of these instances the wills were legally executed, by showing in detail what was said and done by the testator and under his direction at the time they were executed, for the purpose of making it more certain that he knew what was necessary to a legal execution. The offer was excluded, to which the proponents excepted. On cross-examination of these witnesses, the contestants were permitted to and did inquire how the wills were executed, whereupon re-examination on that point was allowed in full. This nullified the exception, for the re-examination was seasonable to enable the proponents to avail themselves of the excluded testimony as effectually as they could have done on examination in chief.

For the same purpose the proponents further offered to show by a man, that he witnessed a former will of the testator's with two others; that the testator asked them to come in and sign, which they did, and were all present when they signed; also to show by the judge of probate that before the will in question was made, many wills drawn by the testator had been admitted to probate in his court.

Though evidence be relevant, it is not necessarily legal error to exclude it, for if otherwise admissible, it should be more than slightly relevant, it should be substantially relevant; it should afford a basis for more than mere conjecture, but for real belief; it should be more than remotely relevant, but proximately relevant. The testimony offered was too slight and conjectural to make its exclusion error.

But what was offered to be shown by the witness McIntyre was much more relevant. It was, that before the time in question, the testator drew and superintended the execution

of a will, and "directed the witnesses to see each other sign, and to look and see the testator sign," but did not say in words that that was necessary. But he need not have said that in order to make the testimony admissible, for the maxim is, not what is said, but what is done, is regarded. The fact that he directed the witnesses to see one another sign would have tended to show that he understood they must sign in the presence of one another, and would have supplemented the like tendency of the attestation clause, which he drew.

It was especially important in the circumstances, and undoubtedly admissible, to show that the testator knew what was necessary to the due execution of a will, for that knowledge would have afforded reasonable ground for an inference that he would be likely to see to it that the requirements were observed, especially in his own case. *In Re Claflin's Will*, 73 Vt. 129, 50 Atl. 815, and authorities cited; *Winchelsea v. Wanchope*, 3 Russell 444.

It is argued by the contestants that this is basing a presumption upon a presumption, which is not allowable. But the testimony offered tended to show, not a presumption of knowledge, but the fact of knowledge, and that fact would have afforded ground for the inference stated. This testimony should have been admitted.

Former statements and testimony of the attesting witnesses, in conflict with their present testimony, could be used by the proponents only for the purpose of impeachment, not for the purpose of showing the same to be true. *Thornton v. Thornton*, 39 Vt. 122, 152.

A more important question arises on the charge where it says that the attesting witnesses must have been informed and have known that it was Claflin's will that they were then and there asked to witness and attest; that if he concealed from them the fact that it was his will, they did not attest his will;

that it was necessary when they signed the will as witnesses that they should know they were signing as witnesses to his will; that they must have been informed of that in some way, and have understood it when they signed.

It appears that the will, including the attestation clause, was written and signed by the testator; that he superintended its execution, and that the attesting witnesses subscribed it at his request and in his presence, but whether in the presence of one another was the important question.

Under statutes like ours, which provide that wills must be "attested and subscribed by three or more credible witnesses in the presence of the testator and of each other," it is very generally held in this country that the witnesses need not know that the instrument they are attesting is a will, because such statutes are construed not to require it; and it is a question of construction, and nothing more.

The English Statute of Frauds, 29 Car. II, c. 2, s. 5, before its modification by 1 Vict. c. 26, s. 9, required wills of lands and tenements to be "attested and subscribed" in the presence of the testator by three or four credible witnesses; and it was always held in England under that statute that the witnesses need not know that the instrument was a will.

In *Wright v. The Trustees of the British Museum*, 6 Bing. 310, only one of the witnesses knew the nature of the instrument; and it was argued that if such a subscription of their names satisfied the statute, the word "attested" would have no force whatever, and might as well have been omitted. But the court said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will, for if, it said, by what the testator did he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, the attestation thereof

must be considered as complete, within the principle and authority of *Ellis v. Smith*, 1 Ves. Jun. 11, decided in 1754. And it appearing that the testator knew the instrument to be his will, as it was written and signed by him; that he produced it to the three persons, and asked them to sign it, intending they should sign it as witnesses; that they subscribed their names thereto in his presence, and returned the same identical paper to him,—it was held that he acknowledged in fact to the witnesses, though not in words, that the instrument was his will, and that its execution was good under the statute; for, the court said, whatever might have been the doubt as to the true construction of the statute, the law was then fully settled that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, nor means of knowledge, either of the nature of the instrument or the testator's object in signing it, and that the facts of that case placed the testator and the witnesses in the same relation as though an oral acknowledgment of his signature had been made.

The same thing is held in *Wright v. Wright*, 7 Bing. 457. In *Trimmer v. Jackson*, 4 Burn's Eccl. Law, 3d ed. 102, a will was established where the testator purposely misled the witnesses into supposing that it was a deed.

In Massachusetts they hold as they do in England, under a statute like ours in this respect. Thus, in *Osborn v. Cook*, 11 Cush. 532, 59 Am. Dec. 155, the testator signed the instrument in the presence of two of the witnesses, and pointed out his signature to the third witness, and each of the witnesses signed the instrument as a witness in the presence of the testator and at his request; but the testator did not disclose to any of the witnesses that it was his will, nor did any of them know

or suspect the nature of the instrument, and yet it was held well executed. The court said that calling on the witnesses to attest his execution of an instrument the character and contents of which he well knew, was in effect a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character of the instrument was not disclosed to them; that it was as if the testator had said, "This instrument is my act, it expresses my wish and purpose, and though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence;" that the legislature had prescribed certain solemnities to be observed in the execution of a will, that it may be seen that it is the free, conscious, intelligent act of the maker, but that it had not prescribed that he should publish to the world nor to the witnesses what is in the will, nor even that it is a will.

Connecticut holds the same way, where the statute requires a will to be in writing, subscribed by the testator and attested by three witnesses, all of them subscribing in his presence and in the presence of each other. *Canada's Appeal*, 47 Conn. 450. It is there said that the primary reason for requiring the presence of the witness is, that he should be able to say that the testator put his name upon the identical piece of paper upon which he put his own; that the witness identifies the paper by the conjunction of the two signatures, not by the character of its contents. *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21, is to the same effect.

In the Matter of the Will of Rachel Hulse, 52 Iowa, 662, 3 N. W. 734, the same is held. There the statute requires a will to be witnessed by two competent witnesses. The court said that to witness means "to see the execution of an instrument, and to subscribe it for the purpose of establishing its authenticity," and referred to the English Statute of Frauds as

containing a similar provision, and said it had been construed as not requiring publication in the sense of acquainting the witnesses with the nature of the instrument.

In *Watson v. Pipes*, 32 Miss. 451, the same is held under a statute taken from 29 Car. 11. The court said that such seemed to be the holding in all the States in which the provisions of the English statute in regard to wills have been adopted; that the rule is based upon the plain and obvious construction of the statute, which it did not hesitate to adopt.

The Alabama code requires wills to be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator." The predecessor of this statute was borrowed from 29 Car. 11, c. 3, s. 5. In *Barnwall v. Murrell*, 108 Ala. 366, 18 South. 831, the court said that as the statute did not require the testator to inform the attesting witnesses that the instrument was his will, it was immaterial to the due execution of the will in that case whether the testatrix made any declaration to the attesting witnesses, or gave them any notice or information, that the instrument was her will.

In *Schouler on Wills*, 3d ed. § 326, it is said to be the long-established doctrine, both of England and the United States, that independently of an express statute requiring publication, a will may be duly executed without any formal announcement by the testator of a testamentary purpose, and without anything being said by him to show the nature of the instrument the witnesses are called upon to subscribe; that the maker's signature *animo testandi*, and his proper acknowledgment, showing that he has put his name *bona fide* upon the paper that he desires witnessed, when he has not signed in their presence, renders the execution valid in general without any other or more formal execution; and that the signature of the witnesses being duly affixed, the act of execution becomes complete.

In Missouri, under a statute that is almost an exact transcript of 29 Car. II, c. 2, s. 5, they hold that there must be some declaration by the testator that the paper is his will, but that it need not be verbal, than an act or a sign is enough; but that the witnesses must know it is the will of the testator, and witness it at his request. *Odenevaelder v. Schorr*, 8 Mo. App. 458. In support of this construction of the statute, *Mundy v. Mundy*, 15 N. J. Eq. 290, is referred to. But that case was decided under a statute that expressly required that the instrument should be "declared to be" the last will and testament of the testator, so no authority for the holding.

The contestants rely much upon *Swift v. Wiley*, 1 B. Mon. 114, where it is said that to attest the publication of a paper as a will, and to subscribe thereto the names of the witnesses, are very different things, and required for different ends; that attestation is an act of the mind; subscription, an act of the hand; that to attest a will is, to know that it is published as such, but to subscribe it, is only to write on the paper the names of the witnesses for the sole purpose of identification. But this case is of little worth, for *Flood v. Pragoff*, 79 Ky. 607, expressly decides that it is not necessary that the witnesses should know the nature of the instrument, and says that the question never before arose in that State; and it hardly could have arisen in *Swift v. Wiley*, for there was a publication there by the testator, at which the witnesses were present. It is said in *Flood v. Pragoff*, that the legislature had prescribed such formalities for the execution of wills as it thought proper, and that the court ought not to add to them by construction, especially when the efficacy of the constructive requirement depended solely upon the memory of the subscribing witnesses.

Illinois and Wisconsin repudiate the idea that there is any difference between attesting and subscribing a will. *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Sloan v. Sloan*, 184 Ill. 579,

56 N. E. 952; *Skinner v. American Bible Society*, 92 Wis. 209, 65 N. W. 1037.

Dr. Lushington said in *Bryan v. White*, 2 Robertson, 315, that he felt no difficulty in answering the question, What is the meaning of "shall attest"? That attest means that the person shall be present and see what passes, and shall, when required, bear witness to the facts. Lord Chancellor Selborne said in *Seal v. Claridge*, 50 L. J. Rep. (1881), 316, that "surely the very words, *ad testari*, imply the presence of a witness standing by who is not a party to the deed to be witnessed." Other English cases say that to attest an instrument is not merely to subscribe one's name to it as having been present at its execution, but includes also, essentially, the presence in fact at its execution of some disinterested person capable of giving evidence of what took place. *Roberts v. Phillips*, (1855), 4 El. & Bl. 450; *Ford v. Kettle*, (1882), 9 Q. B. D. 139. Dr. Lushington somewhere illustrates, that as a notary, by his attestation of protest, bears witness, not to the statements in the protest, but to the fact of making those statements, so the witnesses to a will bear witness to all the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence.

Judge Redfield, both in his work and his cases on wills, strenuously contends that the witnesses must know the nature of the instrument. Otherwise, he asks, what becomes of all that is said about the great solemnity the law attaches to the formal execution of wills? and how are the witnesses charged with the duty of seeing that the testator is of sound mind before they consent to attest the instrument, which, it is sometimes said, commits them to having attested that fact as well as the formal signature of the testator?

As to the "solemnity," the formal execution of wills being mere matter of statutory requirement, whatever has been said

about it dehors the statute goes for nothing. As to the witnesses being charged with the duty of seeing that the testator is of sound mind, the statute does not thus charge them, unless by the word "attested;" and if that word charges that duty, it must, it would seem, charge the further duty of seeing that he is of full age, for that is as essential under our statute as a sound mind. But the word "attested" does not charge the duty claimed, as is shown by *Thornton v. Thornton*, above cited. There it was contended that the weight to be given to the testimony of an attesting witness to a will is matter of law, and that therefore the trial court was bound to charge, as requested, that such testimony is "entitled to much consideration on the question of capacity." But this court said that the law gives no weight to the testimony of such a witness beyond what it would be entitled to under the conditions that usually govern the value of testimony; that the prominence given to such testimony in opinions where both law and fact are discussed, arises from the witness' acknowledged opportunity for observation at the precise time in question, and from the probability of his having used the opportunity on account of his participation in the transaction; that it is because of his opportunity, not because he wrote his name on the instrument, that his testimony is usually listened to with attention; but that the law attaches no fictitious official weight to the testimony, so as to pass it for more than it is worth; but that its value is to be determined by the rules applicable to other testimony.

In *Dean v. Dean*, 27 Vt. 746, it is said that attesting a will by the witnesses is an attestation of its publication; that a formal publication is not necessary; that writing and signing a will is sufficient publication; indeed that any act of the testator's by which he designates that he means to give effect to the paper as his will, is a publication of the will itself. Nothing in this, except the words, "as his will," indicates that the publication

must be such as to inform the witnesses of the testamentary character of the instrument. And these evidently do not mean that, for it had just been said that writing and signing the will was a sufficient publication, and that suggests no such idea. They mean no more than is said in *Roberts v. Welch*, below cited, that a declaration by the testator to the witnesses that it is his will, *or his instrument*, is enough. Otherwise, the court was running counter to the established construction of 29 Car. 11, concerning which the court had a few years before said in *Adams v. Field*, 21 Vt. at p. 266, that "when our statute of wills was enacted, the statute of Car. 11 had received a long, fixed and well known construction; and when we adopt an English statute, we take it with the construction that it has received, on the ground that this was the implied intention of the legislature."

But it is proper to remark in this connection that what is said in *Dean v. Dean* is entirely *obiter*, as the only question was whether the testimony warranted the finding that the will was executed by the testator in the presence of the witnesses, and subscribed by them in his presence and in the presence of each other.

In *Roberts v. Welch*, 46 Vt. 164, one of the witnesses did not know that the testator had signed the paper at all, nor what the paper was, nor for what purpose he himself was signing it. The court said that although it was not necessary for the testator to sign in the presence of the witnesses, but that a declaration to the witnesses that it was his will, or his instrument, would be enough, yet that the witnesses must know that by affixing their names to the instrument they were attesting its execution by the testator; that a person, to become an attesting witness, must be aware of the character of the act he is called upon to perform, and must subscribe his name *animo testari*. As nothing is said about the fact that the witness did not know

the character of the instrument, it is manifest that the court did not regard it essential that he should know it, but only that he should know the character of his own act, and to that end, should know that the testator had signed the paper. This gives force to the word "attested" in the statute, and makes it more than "subscribed," makes it a mental act, but applies it in essentiality only to the execution of the instrument, not to a knowledge of its character.

But it is claimed that in this very case when it was here before—73 Vt. 129, 50 Atl. 815—we said the witnesses must know the character of the instrument. The language most relied upon in support of the claim is this: "Nor was it necessary to show by the attesting witnesses that at the time they signed they knew they were signing the testator's will. This fact, though necessary—*Roberts v. Welch*, 46 Vt. 164—may be shown by other witnesses, or it may be inferred from the circumstances." This language, when taken in connection with the case to which it refers and the context, does not mean, we think, what is claimed for it. The case referred to, as we have seen, does not require that the witnesses must know that the instrument is the testator's will, but only that it is his instrument, and that by affixing their names to it they are attesting its execution as such by the testator.

And when we look at the context, we see that no more was meant, for therein the court had said that writing and signing the will and superintending its execution, was a sufficient publication by the testator, and that in attesting it, the witness attested its publication; and therewith agree the cases. But here is no intimation that the witnesses must know the character of the instrument. And the quotation from *Ilott v. Genge*, 3 Curteis, 181, is to the same effect, for although it says that when a testator writes the will himself, and signs it, and produces it to the witnesses and desires them to sign their names, that

amounts to an acknowledgment on his part that the paper signed by them is his will, yet this is not saying that the witnesses thereby know it to be his will, but only that he himself knows it. That case arose under the statute of 1 Vict., under which it has always been held that when the signature of the testator is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will.

We hold, therefore, that our statute does not require that the attesting witnesses to a will shall know the nature of the instrument.

It appeared that the witnesses were in the store of one of them when they signed; but it did not appear how large the room was, except that it was a country general store. The jury asked if it was enough that the witnesses were in the same room. The court replied that merely being in the same room was not enough, the room might have been so large; that the witnesses must have been together in the presence of one another in such a way and in such a sense that they could see one another sign, whether they actually looked and saw or not; that they must have been right there where they could see one another sign. This is in substantial accord with the *Blanchard* case, 32 Vt. 62, and so no error.

Reversed and remanded.

J. HENRY THORP v. THOS. W. THORP'S ESTATE.

January Term, 1902.

Present: ROWELL, TYLER, MUNSON, START and WATSON, JJ.

Opinion filed August 28, 1902.

*Administration—Defective appeal from commissioners—
Rights of creditor under administrator's appeal—Decla-
ration—Waiver—Agent's liability for interest.*

The creditor of an estate, whose claim is allowed by commissioners in full, but is reduced by more than twenty dollars by the allowance of offsets, is not entitled to an appeal on the ground that his claim is disallowed to that amount; but he may prove his claim under the administrator's appeal, if the pleadings allow.

When the creditor and administrator both appeal from the decision of the commissioners, and no question is raised as to the validity of the creditor's appeal until the case reaches a referee, the creditor may prove his claim in the administrator's appeal, under the declaration filed in his own, though his own may be invalid.

An agent who receives money of his principal which he fails to account for is chargeable with interest thereon, without proof that he made use of it or that he failed to comply with some demand or direction concerning it.

APPEAL from the decision of commissioners on the claim presented by J. H. Thorp against the Estate of Thos. W. Thorp, and the claims presented by Ira W. Thorp, the administrator, in offset thereto. Heard on the report of a referee and exceptions thereto at the March Term, 1901, Chittenden County, *Stafford*, J., presiding. Judgment for the claimant. The estate excepted.

George M. Powers and *V. A. Bullard* for the claimant.

It is not denied that the claimant was entitled to an appeal; it is simply contended that he predicated his application there-

for upon the wrong ground; that he should have alleged the conditions specified in subdivision II, rather than subdivision I, of V. S. 2585. The statute gives the right of appeal not from the allowance or disallowance, but from the *decision* and *report* of the commissioners. If the net result shows a reduction of the claimant's demand to an amount exceeding twenty dollars, an appeal lies. "In these proceedings in Probate Court there is no nicety of form." To reject this appeal for such a purely formal defect as the one here urged, "would be a most senseless and punctilious adherence to nicety in matters of form." *Robinson v. Robinson's Exr's*, 32 Vt. 738.

If the appeal was invalid for the reasons assigned, it was too late for the estate to take advantage of it when the case reached the referee. A motion to dismiss the appeal should have been filed as was done in *Robinson v. Robinson's Exr's*, *supra*. It is analogous to matters in abatement merely, which must be urged at the earliest opportunity or they are waived.

The trial court properly charged the estate with interest on the money received by the decedent belonging to the claimant, for which the decedent had never accounted. When there is no contract to pay interest a party liable to pay money or to account for the same, will be chargeable with interest upon neglect to pay or account for the money in accordance with his duty. *Sprague v. Estate of Sprague*, 30 Vt. 483; *Evans v. Beckwith*, 37 Vt. 280.

W. L. Burnap and *J. J. Monahan* for the estate.

The creditor's appeal is invalid, because the record shows that his claim was allowed in full by the commissioners; therefore the referee had nothing before him to try and all the testimony was improperly received.

Nor will the administrator's appeal avail the claimant. No declaration of this creditor's claim was filed in the administra-

tor's appeal. Consequently no trial can be had thereunder. *Allen, Admr. v. Rice*, 22 Vt. 333; *Stearns v. Stearns*, 30 Vt. 213.

An agent is not chargeable with interest in the absence of an agreement to that effect, or anything to show that the agent was legally in default. 26 Vt. 545; *Blodgett's Estate v. Converse's Estate*, 60 Vt. 410.

MUNSON, J. The decedent had for many years held funds of the creditor to invest and account for. The commissioners allowed the creditor's account as presented, but reduced the sum found due him by an allowance of items presented in offset. The creditor filed in the probate court an application for an appeal from this judgment, representing that his claim had been disallowed to the amount of more than twenty dollars, and filed therewith a declaration of his claim consisting of the common counts in assumpsit. The administrator also filed an application, setting forth the allowance of the creditor's account to the amount of more than twenty dollars, and the disallowance of the claim presented in offset to more than that amount, and appealing from the allowance of the creditor's account and from the disallowance of the offset; and filed with the application his objections to the allowance of the creditor's claim, and a declaration in general assumpsit of his own claim in offset. Both appeals were duly entered, referred as separate cases, and tried together.

No question was raised as to the sufficiency of the creditor's appeal until the hearing before the referee. The administrator then objected to the reception of evidence, on the ground that the creditor's appeal was only from the disallowance of his claim, and that it appeared from the record that no part of his claim was disallowed, and that consequently he had no case to present. It is now insisted that this objection was

properly and seasonably made, and that the evidence should have been excluded; that the creditor's appeal was invalid, and that he could not prove his claim under cover of the appeal taken by the administrator. The creditor insists that the appeal taken by him is valid; that the appeal is not from the allowance or disallowance, but from the decision of the commissioners as shown by the balance reported, and that whenever the net result is a reduction of the creditor's demand he is entitled to an appeal as one whose claim has been in part disallowed.

The statute requires the commissioners to report the claims presented or exhibited in offset, the sums allowed and disallowed, and the final balance, whether in favor of the creditor or the estate; and allows an appeal from the "decision and report of the commissioners." V. S. 2434, 2585. It is clear that the decision referred to is the balance found upon adjusting these counter demands. When the report is accepted the balance returned becomes a judgment for or against the creditor; and this judgment is vacated by an appeal, whether taken by the creditor or the estate. *Allen v. Rice*, 22 Vt. 333; *Stearns v. Stearns*, 30 Vt. 213. It follows that an appeal opens to the appellee all matters that entered into the determination of the balance, so far as the pleadings may entitle him to litigate them.

The rule could not be otherwise in a case like this. It appears that the decedent made annual returns to the creditor, and that each kept a book; that for a long time the variations were slight, and that the difference in the final footings was only about twelve hundred dollars. The creditor presented a demand of \$4,600.06, and the administrator one of \$87,500.68, of which \$3,606.35 was allowed. This indicates that the creditor presented a balance of accounts, and that the administrator presented the debit side of his intestate's book. The creditor's demand covered, in different form, the matters presented by

the estate. It is evident that in such a case an appeal by either party must carry the matter of claim and counter claim before the county court. See *Woodbury v. Woodbury's Est.*, 48 Vt. 94. The matters are not separable, like those considered in *Banfill v. Banfill's Est.*, 27 Vt. 557.

But the administrator insists that, if his appeal opened the whole inquiry, the creditor is not in a position to avail himself of it, because of his failure to file the necessary papers. When a creditor presents a claim, the administrator is required to present in offset whatever demands the estate may have against such creditor. A claimant, whether creditor or administrator, may appeal from the disallowance of his claim. The party against whom a claim is allowed, whether creditor or administrator, may appeal from the allowance of the claim against him. When both claim and offset are presented, and more than twenty dollars of each is allowed, and more than twenty dollars of each disallowed, there may be appeals by both parties in both capacities. When the appeal is by a claimant, he files with his application a declaration setting forth his claim. When the appeal is by one against whom a claim is allowed, he files with the application his objections to the claim allowed, and the claimant then files his declaration in the county court. V. S. 2585, 2588.

It is evident that the creditor's appeal in this case is that of an aggrieved claimant. His application recites only the disallowance of his claim to the amount of more than twenty dollars. He filed with his application a declaration setting forth his claim, but filed no objections to the claim allowed against him. The fact that he appealed "from the judgment of the commissioners" does not alter the case. The appeal, however stated, is necessarily from the judgment; but the ground of appeal lies in something that enters into the judgment,—either the disallowance of his claim to the amount of more than twenty

dollars or the allowance of some claim against him to more than that amount; and the statute requires that the papers filed shall correspond with the ground of the appeal.

The creditor was not entitled to an appeal upon the ground stated in his application. The record disproved the existence of the only fact that could entitle him to such an appeal. His claim was allowed in full, and he was harmed only by the allowance of a counter demand. It now appears that the two claims related to the same account; but if enough appears to show that the allowance in offset was in effect a disallowance of so much of the claim, the fact is immaterial. The statute requires no designation of the nature of the different claims, and the right of appeal must be determined upon the face of the papers as finally accepted by the probate court.

But the appeal of the estate was entered, and both appeals were sent to a referee for adjustment without any question having been raised as to the validity of the creditor's appeal. We have seen that the administrator's appeal opened the whole matter, and the question now is whether the pleadings were such that the creditor could proceed as a claimant. He could not do this without having in the case a declaration of his claim. Under our probate system the claims in favor of and against a creditor are received informally and disposed of, in the first instance, without pleadings. But the statute plainly contemplates that when the case passes to the county court, it shall stand upon a sufficient declaration and be tried upon an issue regularly formed. *Lynde v. Davenport*, 57 Vt. 597. It thus becomes necessary to inquire whether there was a declaration of the creditor's claim in the case as submitted to the referee.

It is clear that when both appeals are entered they are to be treated as one proceeding, for they are necessarily one case. The creditor filed no declaration in the county court in the

appeal entered by the administrator, but the copies of his own appeal which he entered in that court contained a declaration of his claim as filed in the probate court. So his declaration was actually in the files of the county court, and in the files of the case sent to the referee. No question as to the validity of his appeal was raised prior to the reference, and until objection he might well stand upon the declaration thus brought into the case, without filing one in the county court, as he might otherwise have done. There is no irregularity here that may not properly be treated as waived by going before the referee. The views and practice of this court in regard to the waiver and correction of irregularities in probate and other cases may be seen in *Francis v. Lathrope*, 2 Tyl. 372; *Howe v. Pratt*, 11 Vt. 255; *Maxfield v. Scott*, 17 Vt. 634; *Robinson v. Robinson's Exrs.*, 32 Vt. 738; *Cook v. Carpenter*, 34 Vt. 121, 80 Am. Dec. 670; *Huntley v. Henry*, 37 Vt. 165; *Dennis v. Stoughton*, 55 Vt. 371; *Maughan v. Burns' Est.*, 64 Vt. 316, 23 Atl. 583.

The only other exception urged is that regarding the allowance of interest. It appears that Thomas sent Henry annual statements of account, in which he credited himself with his services and charged himself with interest; that from time to time he asked to be notified of any complaints, so that he could govern himself accordingly; and that there was no evidence that Henry ever complained of either class of items. The master finds from the course of dealing and the correspondence that Henry did not intend to charge Thomas any more interest than Thomas had allowed him in the statements sent. But this finding does not dispose of Henry's right to charge interest upon receipts of which he had no knowledge; and our understanding is that the items in dispute all relate to matters which through some oversight were not entered in the account. So the right to recover this interest is an open question, to be determined by the rules of law applicable to the case

of a financial agent. Nothing appears in regard to these monies except that Thomas received them and failed to enter them. The estate contends that something more than the mere receipt and retention must be shown to make it chargeable with interest, citing *Blodgett's Est. v. Converse's Est.*, 60 Vt. 410, 15 Atl. 109. It is doubtless true that it must ordinarily be shown that the agent has made some use of the money, or that he has failed to comply with some demand or direction concerning it. But we think that, in the circumstances of this case, Thomas's failure to render an account of the receipts furnishes the further element needed to charge him with the payment of interest. By the course of dealing which prevailed here, he should have made return of these receipts in his annual statements. Having left Henry without knowledge of the receipts, however innocently it may have been done, he cannot refuse the payment of interest on the ground that no demand was made or direction given. When he failed to make any entry or return of this money as the property of Henry he in effect mixed it with his own, and subjected himself to the presumption that he derived some benefit from it, and should pay for the use of it.

Judgment affirmed and ordered certified.

JOHN S. WILKINS v. TRUMAN R. STILES, ET AL.

October Term, 1901.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, WATSON and
STAFFORD, JJ.

Opinion filed August 28, 1902.

*Prohibition—Judgment of a justice of the peace—Form and
nature of—Jurisdiction.*

The judgment of a justice of the peace, rendered after he has received and considered evidence in support of the plaintiff's claim, is necessarily a judgment on the merits, whatever its form and upon whatever motion it is given.

That the matters in issue in an action before a justice of the peace are *res judicata* does not deprive the justice of jurisdiction, so that prohibition will lie to restrain further proceedings under an erroneous judgment therein.

Bullard v. Thorp, 66 Vt. 599, distinguished.

PETITION FOR WRIT OF PROHIBITION. Heard on pleadings and testimony at the October Term, 1901, of this court, sitting for the County of Chittenden. Writ denied.

May & Simonds for the relator.

Ever since *Smith v. Crane*, 12 Vt. 487, it has been understood that a justice has no power to enter a non-suit, (unless the statute expressly gives it), unless the party consents. Even the county court cannot compel a plaintiff to submit to a non-suit simply because his evidence appears to be insufficient. *French v. Smith*, 4 Vt. 663. In this case the justice found that the evidence was not sufficient; this clearly gave the plaintiff in the suit no right to claim a non-suit. If there is any doubt about what the record means, the law presumes the cause was heard upon its merits. 32 Vt. 678.

See also *Washburn v. Allen*, 77 Me. 344; 6 Am. & Eng. Pl. & Pr. 841; Herman on Estp. s. 243.

The second suit brought before Justice Worcester was absolutely barred, and the justice had no jurisdiction. 66 Vt. 599; 16 Am. & Eng. Pl. & Pr. 1133.

G. C. Frye for the respondents.

The justice in the first suit did not decide the case upon the merits, as his record shows. The defendant did not ask for a judgment, but made a motion that the suit be dismissed; and the justice dismissed the suit in accordance with the motion. The second suit was heard upon its merits, and the judgment cannot be reversed or interfered with. V. S. 1045; *Perry v. Morse*, 57 Vt. 509.

A writ of prohibition will not be granted where the inferior court has jurisdiction. Nor will the writ be allowed to take the place of an appeal, or to review the proceedings of an inferior court having jurisdiction. High's Ex. Leg. Rem., Chap. 21.

Even if there was error in rendering judgment for the plaintiffs in the second suit, it is no part of a writ of prohibition to prevent or correct errors in questions of which the court has cognizance and jurisdiction. *Perry v. Morse*, 57 Vt. 509; *Bullard v. Thorp*, 66 Vt. 599.

MUNSON, J. The relator seeks to prohibit further proceedings in an action wherein judgment was rendered against him by Albert Worcester, a justice of the peace. He concedes that if Justice Worcester had jurisdiction over the claim or matter in suit at the time this judgment was rendered, his petition will not lie. But he claims that the jurisdiction which Justice Worcester would otherwise have had was taken away by proceedings previously had before David Frechette, another

justice of the peace. His claim, more specifically stated, is that the matter of the suit had been fully settled in the case decided by Justice Frechette; that the plaintiffs split their claim in bringing these suits; and that this was done to deprive the county court of its appellate jurisdiction.

Both actions were suits in trover for the conversion of the same two mileage books. The minute made by Justice Frechette upon the writ, after noting appearances, was as follows: "As the evidence in the case did not show to what degree the defendant damaged the plaintiff, and no malicious intent from the defendant, therefore the court adjudged that the case be dismissed, and that the defendant recover his costs." The relator insisted in the suit before Justice Worcester that the judgment in the first suit was a bar to that action, and plaintiffs' counsel then produced the record of that judgment as finally made up by Justice Frechette. This showed that the defendant moved "that the plaintiffs become non-suited and the case be dismissed because the plaintiffs had not put in sufficient evidence as to the distance which the defendant was entitled to go upon said mileages whereby the court could assess damages," and that after hearing the arguments upon this motion the justice found that the evidence did not show to what degree the defendant damaged the plaintiffs, and that plaintiffs should therefore become non-suited and the case be dismissed and the defendant recover his costs. Justice Worcester held upon inspection of this record that the prior judgment did not bar the proceedings before him, and rendered judgment for the plaintiffs.

The judgment rendered by Justice Frechette, although called in his record a judgment of non-suit, is shown by that record to have been in fact a judgment upon the merits, and Justice Worcester erred in holding the contrary. It appeared from the record that evidence in support of the plaintiffs' claim

was introduced, and that the justice considered it, and gave judgment for the defendant because of its inadequacy. A justice judgment rendered upon such proceedings is necessarily a judgment on the merits, whatever its form, and upon whatever motion it is given. *Smith v. Crane*, 12 Vt. 487.

This brings us to the question whether Justice Worcester exceeded his jurisdiction in giving judgment for the plaintiffs in disregard of this prior adjudication. The case was certainly within his jurisdiction in the sense in which the subject is treated in *Perry v. Morse*, 57 Vt. 509; that is, he had jurisdiction of claims in trover to the required amount, and of the process before him, and of the parties named in it. It was also within his jurisdiction to construe the record of the former judgment when offered in evidence, and give it effect in reaching his decision. But he was led by a misconstruction of this record to give judgment upon a matter that had been previously adjudicated, and it is claimed that in rendering the judgment he acted without jurisdiction.

The general rule is that when a court has jurisdiction of the subject matter and the parties, the writ of prohibition is not available for the correction of its erroneous decisions. But when the erroneous decision is one which operates as an unlawful assumption of jurisdiction, prohibition may be had, as appears from *Bullard v. Thorpe*, 66 Vt. 599. So the question for decision is whether the error of law committed by Justice Worcester carried him beyond his jurisdiction.

In delivering the opinion in *Bullard v. Thorpe*, Judge Taft reviewed the decisions of different jurisdictions, many of which may seem from the brief statements there made to support the relator's contention, and some of which undoubtedly do support it. But near the close of the opinion, Judge Taft reminds the reader that this review was largely by way of illustration,

and that the case must not be taken as authority for anything beyond the exact point decided.

The general rule above stated is distinctly recognized in *Bullard v. Thorpe*, and one of the cases cited in that connection is *Toft v. Rayner*, 5 M. G. & S., 162, which is exactly in point here. The defendant was summoned before the county court in Cambridgeshire in an action for goods sold and delivered, and it appeared that the plaintiff had already recovered judgment against him in an action for the same debt in the borough court of Cambridge, and that his goods had been seized and sold upon that judgment. The plaintiff recovered notwithstanding this, and the defendant sought to prohibit further proceedings, on the ground that, the matter being *res judicata*, the county court had no jurisdiction. The relator's counsel was asked how it could be said that the county court had no jurisdiction, and replied exactly in the line of the present argument, that it had jurisdiction of the matter at first, but that that jurisdiction ceased when the former judgment was shown. But the court said that the ground of the application was neither more nor less than that the county court, in deciding what it was competent for it to decide, made a mistake in point of law; and the writ was thereupon denied.

It is certain that the matter now complained of was not jurisdictional. The decision was not one by which the justice took unlawful cognizance of the subject matter or the parties. His jurisdiction of both was complete, and continued notwithstanding the record of the former suit. The production of that record merely raised a question incidental to the trial of his case. His erroneous decision of that question to the injury of the relator was a misfortune to which all suitors are liable in cases where no appeal is allowed to a higher court. The extension of the remedy of prohibition to such cases would lead to a review by this court of all unappealable cases where ignor-

ance of our decisions had led to the rendition of improper judgments.

This case is clearly distinguishable from *Bullard v. Thorpe*. There was in each case an erroneous disposition of a matter which the court had authority to determine; in one a disregard of the doctrine of *res judicata*, in the other a refusal to recognize the entirety of the claim. But the first was a decision which had no jurisdictional consequences; while the second gave the justice a final jurisdiction to which he was not entitled. The legislature has denied litigants the remedy of appeal when the matter in demand does not exceed twenty dollars, but has given them the remedy when the matter in demand exceeds that amount; and they cannot be deprived of this right by splitting an entire claim into sums below the statutory limit. The writ of prohibition was held available to prevent this—not because the decision was erroneous, but because the court thereby assumed an exclusive jurisdiction to which it was not entitled. The decision now complained of was equally erroneous, but it worked no infringement of jurisdictional limits.

It is not necessary to examine the evidence upon which it is claimed in argument that this case presents a splitting of the claim that affected the final jurisdiction. The petition does not in terms allege, nor set forth facts which indicate, that there was a splitting of the claim, and that matter cannot be treated as in issue.

Petition dismissed with costs.

KATHERINE HUNT, ET AL. v. HORACE TOLLES, ET AL.

May Term, 1901.

Present: ROWELL, TYLER, MUNSON, WATSON and STAFFORD, JJ.

Opinion filed August 28, 1902.

Cemeteries—Dedication—Evidence—Control— Deed— Sufficiency of designation of grantee—Inhabitants of school district—Defacement of cemetery—Damages.

Evidence that strips of land, adjoining a cemetery granted by deed, were added thereto by moving out the boundary walls and extending them to complete the enclosure, and that thereafter lots were taken and interments made in such additions the same as in the original cemetery, is sufficient to show a dedication of the additional land to the purpose of the original grant as shown by the deed thereof.

A deed of land for cemetery purposes made to the "inhabitants" of certain school districts, the districts as such being incapable of receiving the land for such purposes, is too indefinite to confer any title on such inhabitants as individuals; but it creates a trust which the court of chancery will protect by the appointment of a trustee to control the same, unless the control is placed elsewhere by statute.

Such a deed, though invalid, will determine the scope of the dedication, and will prevent the cemetery from being a public one within the meaning of the statute.

Under such a deed, individuals to whom particular lots in the cemetery have been assigned, cannot acquire such an interest in or control over such lots as will give them the right to deface the same.

APPEAL IN CHANCERY. Heard on the report of a special master and the orators' exceptions thereto at the December Term, 1900, Windsor County, *Start*, Chancellor, presiding. Decree dismissing the bill. The orators appealed.

Wm. P. Dillingham and *Gilbert A. Davis* for the orators.

The circumstances under which the additions to the cemetery were made, including the fact that the several additions were owned by descendants of Consul Jarvis, clearly indicate a dedication of the same to the purposes specified in the original grant.

The school districts had no power to hold land for burial purposes. The selectmen had no authority over this cemetery because it did not become a public one. The grant to the "inhabitants" is too indefinite; yet a court of equity will not allow the gift to fail, but will appoint a trustee. *Montpelier v. East Montpelier*, 29 Vt. 12; *Peter v. Beverly*, 10 Pet. 532; *Tucker v. Society*, 7 Met. 188; *Burbank v. Whiting*, 24 Pick. 146; *Winslow v. Cummings*, 3 Cush. 358; *Vidal v. Girard*, 2 How. 187; *Burr v. Smith*, 7 Vt. 241; *Clement v. Hyde*, 50 Vt. 716; *Mann v. Met. Ep. Ch.*, 27 N. J. Eq. 47.

The good faith of the defendants will not avail against these proceedings.

J. C. Enright, E. R. Buck and William Batchelder for the defendants.

Whatever the effect of the original grant may have been, the additions to the cemetery constituting a considerable part of the same must be held to be a public cemetery by dedication, and under control of the selectmen. In fact the defendants claim the whole cemetery is a public cemetery. Beach on Trusts, s. 555. And being such came under the care of the selectmen. V. S. 3583, 3584; *Pierce v. Spafford*, 53 Vt. 394.

An injunction will not lie to restrain an administrative officer from performing his ordinary official duties. Thorp on Public Officers, s. 559, and cases. The work complained of was done under the direction of Wilson acting for the board of selectmen. And having been done in good faith and for the

very purpose of improving the appearance of the cemetery, is beyond the reach of this proceeding.

MUNSON, J. On the fifteenth day of September, 1813, William Jarvis, of Weathersfield, better known as Consul Jarvis, conveyed "to the inhabitants of the Third and Fourth School Districts in the town of Weathersfield, their heirs and assigns forever," certain land in the town of Weathersfield, to be held by them "the said inhabitants of said districts their heirs, administrators, executors and assigns," so long as the same should be improved for the sole purpose of a burying-ground; reserving to himself and his heirs, executors, administrators and assigns, a lot three rods square near the center of the land described. Consul Jarvis was a resident of the Fourth District, and the land conveyed was in the same district, about a fourth of a mile from his house. A plat of ground, appropriated in the life time of Consul Jarvis, but differing in size and location from the reservation, has been used as the family lot. The remains of Consul Jarvis, of his son Major Charles Jarvis, and of other members of the family, rest in this lot, surrounded by the graves of their neighbors who have been buried there from time to time since the deed was given. The bill is brought by a daughter and grand-daughters of Consul Jarvis, who are inhabitants of the Fourth District, in behalf of themselves and any others, inhabitants or heirs, who may desire to be joined, and alleges a defacement of the cemetery by the improper cutting of trees and shrubbery, and prays that all further cutting be enjoined, and that the defendants be ordered to pay such sum as will restore the cemetery as nearly as possible to its former condition, and for such other and further relief as the court can give. The defendants are the first selectman of Weathersfield and persons who acted under him in doing the work complained of, most of whom were inhabit-

ants of said districts, and had relatives buried in the cemetery. The answer alleges that the cemetery had been almost entirely neglected for many years, and had become unsightly from an overgrowth of trees and bushes, and that the work in question was undertaken at the request of the inhabitants of said districts, and was intended to improve and beautify the cemetery.

Speaking generally, the cemetery lies in the angle formed by the intersection of the turnpike and the road leading west from the turnpike to Jarvis' mills. The description in the deed begins at a stake in the north side of the road about ten rods west of the turnpike, and continues by courses and distances without further mention of existing boundaries,—the first course being to the west. The line returning to the first bound runs along the top of a bank at the bottom of which the turnpike is located. In 1850 Consul Jarvis deeded to some grandsons a tract of land which, as described, surrounded the cemetery, reserving the use of it during his life. In 1865, which was after Consul Jarvis' death and while the title was in some of his descendants, strips adjoining the cemetery on the east, west and south were added to it by moving out the boundary walls and extending them to complete the enclosure. The addition on the east included the bank just referred to. Since then lots have been taken and interments made on these additions, the same as upon the original grant. Nothing further appears in regard to this enlargement. We think the findings are sufficient to show a dedication of this additional land to the purpose to which the original grant was devoted by the terms of Consul Jarvis' deed, and that no distinction should be made between the original cemetery and the additions as regards title or control.

It does not appear that any one claimed or assumed control of the cemetery, nor that there was any supervision of it, prior to 1866. At a meeting of school district number Four,

held in March of that year, one Haskell was elected sexton "as far as the district had the right to," and this choice was ratified later in the year at an informal meeting held in the cemetery and participated in by persons who had been engaged in making the improvements hereafter referred to. Mr. Haskell served as sexton until 1884, when he was succeeded by Henry W. Sheldon, as to whose authority nothing appears. Sheldon served until about 1890, and was then succeeded by Sylvester W. Jones, who has since acted. It appears from parol evidence that Jones was elected sexton at a meeting of district number Four, but there is nothing regarding an election in the records. He has had no other appointment. The town has never chosen cemetery commissioners, and no vote of the town in regard to this cemetery is shown. The selectmen had a meeting in October, 1898, when the necessity of clearing up this and other cemeteries in the town was discussed. This meeting was attended by defendant Wilson and another member of the board, the third member having been duly notified. The result of this meeting was an understanding that Wilson should proceed and do the work as he thought proper. He thereupon caused to be read from the pulpit of the church in the neighborhood of the cemetery, at a regular Sabbath service, a notice requesting those interested in the improvement of the cemetery to meet at the cemetery for that purpose. The acts complained of were done by those who assembled in pursuance of this call.

Very little is shown as to the care and condition of the cemetery during the first forty years of its existence. It may be inferred from the fact that Consul Jarvis himself occasionally turned sheep into it to be held for washing in the river near by, that not much had been done for its improvement or ornamentation. In 1865, it was largely overgrown with bushes and small trees. At this time Mrs. Richards, a daughter of

Consul Jarvis, inaugurated a movement for its improvement, and secured assistance in money and team-work from the people of the two districts generally. The bushes and small trees were cut, the grounds graded, drive-ways laid out, and a suitable entrance erected. Fir-trees, pines and maples were procured and set out in suitable places. The trees removed by the defendants from the interior of the cemetery were mostly trees set out or selected for preservation at this time.

From 1866 to 1898, there was no systematic care of the grounds. Some lots were partially cared for, and some grass and bushes were cut annually by the sexton and volunteer assistants. Occasionally a tree was cut by the owner of the lot upon which it stood. Sometimes, before a funeral, drooping limbs that interfered with the driving of carriages to the grave were cut away. But this work accomplished little towards keeping down the growth, and in 1898 there was great need of a judicious thinning and trimming in the interior of the cemetery. The steep bank which descends to the highway from the easterly edge of the platted portion of the cemetery was at this time covered with a dense growth of trees and underbrush.

At the time appointed defendant Wilson and about twenty others met at the cemetery, looked the place over, and had some general discussion as to what had better be done. Mr. Wilson then arranged with two men to clear the east bank and clean it up properly; directed that no trees should be cut on the Jarvis lot, nor on any lot that was cared for by the owner, nor on any other lot against the known wishes of those interested, nor where there was danger that the falling would injure a stone, nor in the south row of trees; and placed some restrictions upon the trimming of a few trees in the south-east corner; but beyond this directed them to use their own judgment, and to cut trees

in the interior as they thought best, even if it took them all. He left the cemetery after being there about two hours, and the work was then taken up and carried on in his absence, and without anyone having special charge or direction. The master finds that all the defendants acted in good faith and for the purpose of improving the cemetery.

It appears that thirty-five trees in the platted portion of the cemetery were cut, most of them maple, pine and hemlock. Of these, twenty-two were trees set out or intentionally left standing in 1865. The northerly part of the wooded bank was entirely cut over before the work was stopped. The master has not undertaken to pass judgment upon the propriety of these cuttings, but has submitted a somewhat detailed statement of matters bearing upon the issue. It is not likely, however, that the most complete description would enable the court to speak with certainty regarding the desirability of all that was done. It is evident that in the case of large-growing trees the lapse of twenty-five or thirty years might convert what was at first a suitable ornamentation of the platted ground into an excessive and injurious growth. On the other hand, it may well be supposed that a work of reduction, undertaken and carried on as this was, would be done without much discrimination. In fact, it specifically appears that one tree was cut on the Jarvis lot notwithstanding the restriction imposed by the selectmen. The clearing of the easterly bank was apparently undertaken without any conception of the possibilities that lie in the management of a wooded slope bordering the platted portion of a cemetery. In view of the difficulty of judging correctly as to the details of the work, and the difference in taste regarding the desirability of trees in the part devoted to interments, the court cannot well go farther in characterizing the acts of the defendants. It is certain that the harm done, whatever its exact limit, can be remedied only by competent management in the

future, aided by the healing hand of time; and it becomes our further duty to inquire whether there is any legal method by which this gift of an honored citizen for the benefit of his neighborhood may be conserved and perpetuated.

The deed is to the inhabitants of the Third and Fourth school districts and their heirs and assigns. The districts were incapable of taking land for the purpose named, and it is not necessary to inquire what words are essential in conveying to a corporation. If there was any conveyance here it was to the inhabitants of the two districts as individuals, and the question arises whether there was an adequate designation of grantees. It is well settled that grantees may be sufficiently indicated without using their names. It may be done by any description that will distinguish them from all others. Thus, a grant to the children of A is sufficient. But designations other than by family relationship are looked upon with less favor. A grant to "the owners * * of the brick house and curtilage adjoining the property hereby conveyed on the west side thereof" was held insufficient. *Schmidt v. Blaul*, 66 Md. 141, 6 Atl. 669. It is said in Co. Lit. 3a, that a grant to the parishioners or inhabitants of Dale, or to the commoners of a certain waste, is void for uncertainty. But it is said in 2 Wash. Real Prop. 588, that while a grant to the inhabitants of a neighborhood which is not determined by ascertained limits would be void, one made to the inhabitants of an unincorporated but certainly defined district might pass an estate to its then residents.

Descriptive designations of this character are sustained upon the principle that that is certain which may be made certain. But it is obvious that there must be a limit to the application of this maxim short of absolute impossibility. Theoretically, much may be made certain that in practice must remain unascertained. The doctrine stated must be kept within reasonable limits, however difficult it may be to draw the line of

demarcation. The law must recognize the necessity of having certainty without undue expense. The ascertainment of a hundred persons, men, women and children, who were inhabitants of a certain district on some given day, may not be beyond the reach of effort and expenditure, but it is something that cannot reasonably be required. We are not disposed to sustain a grant made to an aggregation of people designated by municipal limits.

This leaves the heirs of the inhabitants of 1813 without title, but does not leave the court without power to preserve the interests which the deed of 1813 was designed to establish and perpetuate. A deed which assumes to convey property to a public use, but passes no legal estate because of the inability of the grantee to take or the failure to name a grantee, creates a trust which the court of chancery will protect by the appointment of a trustee. *Bailey v. Kilburn*, 10 Metc. 176, 43 Am. Dec. 423. In *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58, where a devise was held void because the association was not a corporation, and the members were not so designated as to take as individuals, it was intimated that, if the application were to the court in chancery, a different result might be secured. In *Beatty v. Kurtz*, 2 Pet. 566, 7 L. Ed. 521, a lot had been marked "for the Lutheran church" in the original plan of an addition to Georgetown, and had afterwards been used by the Lutherans of that town as a place of burial, with the acquiescence of the donor. There was no church organization of any kind at the time of the appropriation, and afterwards only a voluntary association without corporate powers. The court considered that, if the appropriation were to be deemed of any validity, it must be upon principles other than those that ordinarily apply between grantor and grantee, and sustained it as a dedication of the lot to public and pious uses.

The deed executed by Consul Jarvis is invalid; but the facts remain that the grantor and his descendants have recognized and asserted the appropriation, that the inhabitants of the two districts have used the ground and attempted to care for it, and that three generations of their dead lie buried there. The authorities above cited are sufficient to show that the making of some adequate provision for the control of a cemetery thus circumstanced, is within the power of the court of chancery, unless the control is placed elsewhere by statute.

The statute puts public burial grounds in charge of the selectmen or cemetery commissioners, and this cemetery would doubtless be within the provision if the act of Consul Jarvis were held to be a dedication to the general public without limitation as to the management. V.S. 3583, 3584, 3589; *Pierce v. Spafford*, 53 Vt. 394. But though the deed is invalid, it is the written evidence which must determine the scope of the dedication, and it discloses an intention to give the control to the inhabitants of the two districts. In one part of the deed, the grantor speaks of the property as the "district's land." It may be that the appropriation did not contemplate any restriction as to interments, but more than this is required to make a burial-ground public within the meaning of the statute. The statute itself provides that the sections above cited shall not apply to a burial-ground which is subject to other control than that of the selectmen or cemetery commissioners. The care of this cemetery was committed by the dedicatory act of its donor to a community other than the town, which community is incapable of executing the trust, and equity will effectuate the purpose of the donor by the appointment of trustees.

It is not necessary to distinguish between the defendants in respect to their relations to the cemetery or the part which they took in the work. They were all there for a common purpose, which embraced the renovation of the entire ground, and

each must be held to have had a part in all that was done. They were all acting under the directions of the first selectman, who was acting in his official capacity, with mistaken views as to his authority. No effect can be given to the fact that some of the defendants belonged to families to which particular lots had been assigned. It was impossible to acquire any interest in or control over individual lots that could be asserted against this proceeding; and if it had been possible, such an interest or control could not have justified all that was done. It is not necessary to the disposition it is proposed to make of the case that there be a more definite ascertainment of the damage. In view of the finding that all were acting in good faith, and of the difficulty of determining just how much of the work was injurious, and of the impossibility of rectifying a mistake of this character by money assessments, and of the fact that the future good of the cemetery may depend upon the harmonious co-operation of the community to which it was given, we feel justified in making the damages practically nominal.

Decree reversed and cause remanded with mandate that a decree be entered appointing one trustee or three, as may be deemed advisable, to hold, manage and care for, under the direction of the court of chancery, the cemetery grounds designated in the opinion, with power to sell or assign to applicants lots therein, subject to such uniform rules regarding the individual care thereof as the trustee or trustees may adopt with the approval of the court of chancery; of the management of which trust annual report shall be made to the court of chancery at the June Term in each year.

And that the orators recover of the defendants fifty dollars damages, to be paid to the trustee or trustees for use in the future care of the cemetery; the matter of costs below being left to the determination of the court below.

And that the defendants be perpetually enjoined from cutting or injuring the trees and shrubbery in the cemetery so designated, except as those interested in individual lots may do this by permission of the trustee or trustees, or in caring for such lots under the rules herein provided for.

ALBERT SOWLES AND JENNIE P. DENNEY, APLTS. v. H. E. LEWIS AND C. S. L. LEACH, ASSIGNEES.

May Term, 1902.

Present: ROWELL, C. J., MUNSON, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed September 10, 1902.

Insolvency—Jurisdiction of claims—Assignee—Affirmance of fraudulent mortgage—Conveyance by insolvent—Compromise of claim—Surety—Findings of referee—Avoiding purchase by assignee—Equity—Accounting—Motion to recommit.

Commissioners appointed under V. S. 2143 have no jurisdiction of claims created by an assignee in insolvency in the settlement of the estate. Such claims should be made a part of the assignee's account, to be passed upon by the judge of the court of insolvency under V. S. 2148. *Sowles v. Finn*, 63 Vt. 563, explained.

When an assignee in insolvency prosecutes to judgment a suit to recover the value of property mortgaged by the insolvent, on the ground that the mortgage is an unlawful preference, he thereby affirms the mortgage as a valid incumbrance.

The insolvent's right of redemption in the property covered by a mortgage so affirmed is in the assignee, and the insolvent's subsequent quitclaim deed conveys no interest in such property. If such mortgage has been assigned to a third person for the insolvent's benefit, and the law day has passed, such subsequent deed conveys whatever rights the insolvent had under such assignment,

and upon redemption of such mortgage by the assignee in insolvency, the amount paid is held in trust for the grantee in such deed.

When an insolvent has procured his mortgage to be assigned to a person for his benefit by giving that person his note therefor, and his assignee in insolvency redeems such mortgage, the assignee in insolvency is not required to discharge such note.

The right of an assignee in insolvency to compromise a claim against the estate under direction given by the judge of the court of insolvency pursuant to V. S. 2107 cannot be questioned by the insolvent; nor is the propriety of the action of the court of insolvency in this behalf within the jurisdiction of a referee appointed on appeal from commissioners.

The question whether an assignee in insolvency can purchase and hold a claim against the estate is not within the province of such referee.

When a debt against an insolvent is secured by mortgage and also by the obligation of a surety, and the avails of the security are applied on the debt by the party holding it, the surety can prove the balance of the debt which he has to pay; and if he has proved the whole debt, he should ask leave of the court of insolvency to withdraw his former claim and prove a claim for the sum so paid.

A finding by a referee that a certain expected compromise "may have influenced" the insolvent in giving his consent to the purchase of a part of the land of the insolvent estate by the assignee in insolvency, does not establish the fact that he was so influenced.

Nor does such finding amount to a finding that the insolvent is not estopped from attempting to avoid such sale.

The purchase by an assignee in insolvency of property of the estate is, in a court of law, treated as valid unless actual fraud is shown. There being no fraud in the sale here in question, the insolvent's remedy, if any, is in the court of chancery.

When an insolvent, after his petition in insolvency is filed, sells a note belonging to his estate which his assignee is compelled to purchase, he is chargeable with the amount paid by the assignee therefor, in an accounting between them.

The amount found due on such a note at the time of its sale by the insolvent, with the other facts found by the referee, sufficiently indicate an intention to assess the damages on this basis.

It cannot be said that the allowance by a referee of an item not included in the specification was legal error.

A motion to recommit the report of referee is addressed to the discretion of the court, and no exception lies to the decision thereon.

APPEAL from commissioners in insolvency. Heard on the report of a referee, the appellants' motion to recommit the same and exceptions thereto, at the March Term, 1902, Franklin County, *Tyler, J.*, presiding. The motion to recommit was denied, the exceptions overruled, and judgment rendered on the report and ordered certified. The appellants excepted.

E. A. Sowles, H. M. Mott and H. C. Royce for the appellants.

Albert Sowles had, through his brother Merritt, purchased and owned the note and mortgage given by him to the Burlington Savings Bank. He gave his brother Merritt his note therefor, and Merritt had the mortgage transferred to himself. When the assignees redeemed this mortgage they did not discharge Albert's obligation given therefor. As between the assignees and Albert this amounted to a fraud, and they should not be allowed to take advantage of their own wrong and claim an interest in the property adversely to him.

The findings of the referee amount to a finding that the insolvent's consent to Lewis' purchase and holding of the Foundry Street property was given and continued by reason of a prospective compromise, in reliance upon it, and for the purpose of carrying it out. Therefore, if Lewis is to be allowed to keep this property he is bound to carry out the terms of the compromise agreement. *Bigelow on Estp.* 684, n. 4, and cases cited. *French v. Barre*, 58 Vt. 567; *Soper v. Frank*, 47 Vt. 368.

The Austin note and mortgage were paid in full to the assignees. The insolvent, therefore, is not chargeable with anything collected on them. If chargeable at all, it would be for the sum which the assignees necessarily paid in buying back the

claim. This sum is not found. Therefore, there is no basis for assessing damages under this item. The George Sowle judgment should not have been allowed, for the simple reason that the assignees did not claim it, and did not include it in their specification.

The referee had no jurisdiction over the compromise of the claim of the Government against the insolvent. It was in no sense a claim of the assignees against the insolvent. *Sowles v. Flinn*, 63 Vt. 563; *Sowles v. Bailey*, 69 Vt. 515.

The referee had no jurisdiction to allow the assignees for the purchase of the claim of the National Union Bank. "Lewis paid for it and owns it."

Lewis' own claim against this estate was secured, and from the securities he received a benefit of \$2,895. He proved his whole claim, so the result is that he seeks a dividend on the whole claim and seeks to hold the benefit of the security. The security was not disposed of as required by law, and he should account for the amount received therefrom.

Henry A. Burt, Farrington & Post and Alfred A. Hall
for the appellees.

The referee had no jurisdiction to consider matters pertaining to the assignees' accounts, employment of attorneys, and insolvent's services. *Sowles v. Flinn*, 63 Vt. 563.

The suit by the assignees against the Burlington Savings Bank left the mortgage good and valid, with a right of redemption in the assignees. The assignment of that mortgage carried to Merritt Sowles no greater interest than the Bank held, and upon redemption of that mortgage in Merritt Sowles' hands, it left him with no further interest in the property.

The insolvent cannot question the wisdom of the compromise of the United States judgment. It was done under the authority of the court and the referee finds that the insolvent has

put himself in a position where he is estopped from questioning the transaction.

H. E. Lewis is clearly entitled to prove against the estate the sum which he was compelled to pay for the benefit of the insolvent. Though he has proved for the whole amount of this debt, it is for the court of insolvency to say whether he shall be allowed to change his claim and stand as a creditor. It will be observed that he never had any securities in his hands. He was not in a position to surrender any security or apply for its sale. The Bank held the security, and the Bank received the avails of it.

The insolvent's claim for services are matters pertaining to the assignees' account, and should be raised in the court of insolvency.

The referee has found that the Foundry Street property was purchased by Lewis under an agreement and arrangement to which the insolvent was a party, for more money than was offered by anyone else; that Mr. Lewis has since built two buildings on the premises. It is too late for the insolvent to question this transaction.

The insolvent converted the Austin note and mortgage. He should account for their value.

WATSON, J. This case came into the County Court under the provisions of V. S. 2145, by appeal from the the decision of commissioners appointed by the Court of Insolvency under the provisions of V. S. 2143, by mandate from this Court in *Sowles v. Bailey*, 69 Vt. 515, 38 Atl. 237. A hearing was had before a referee, and upon the coming in of his report, exceptions thereto and a motion to recommit were filed by the appellants. The motion was denied, exceptions were overruled, judgment was rendered on the report according to the findings and holdings of the referee, and ordered to be certified

to the Court of Insolvency, to all which the appellants excepted. Upon the questions thus raised, the case is here.

Regarding some of the matters upon which the referee heard evidence and found facts, and some upon which he refused to hear evidence under exceptions by the appellants, the question of jurisdiction is interposed. In this respect, the construction of the same statute was before the Court in *Sowles v. Flinn*, 63 Vt. 563, 22 Atl. 620. It was there held that the law had "reference solely to claims, liens, and other matters in difference arising in the settlement of an insolvent debtor's estate, in respect of the property of the debtor which is conveyed to the assignee by the deed of assignment" from the Court of Insolvency; and that all questions which arise in reference to the services of an assignee, and the payment of any claims created by him in the administration of the estate, should enter into the accounts of the assignee, and as such, be audited and passed upon by the judge of the Court of Insolvency under the law as contained in V. S. 2148.

That such was the holding in that case is not disputed; but it is contended that the case of *Sowles v. Bailey*, before cited, is in conflict therewith, and, being a later case, it must prevail; and especially so, since the mandate thereof under which the commissioners were appointed is controlling. But an examination of the latter case shows that no such question of jurisdiction was there involved; for the subject matters upon which the petition was based, were in respect to the rights and interests of the relators in certain real estate, debts, and claims, which were claimed by the assignees to belong to the insolvent estate. There was no question apparently having its basis in the administration of the estate before the Court. The mandate must be construed with reference to the case as presented, and when so construed, instead of that decision being in conflict with *Sowles v. Flinn*, it is in accordance therewith. The

referee therefore properly refused to take cognizance of matters touching the insolvent's claim for services and for the support of himself and his family; also of matters pertaining to the employment of attorneys by the assignees and the assignees' accounts.

The petition in insolvency was filed April 12, 1884. On the eleventh day of the preceding month the insolvent mortgaged a part of his real estate to the Burlington Savings Bank to secure the payment of a prior indebtedness due from him to the bank. After the filing of the petition, and before the debtor was adjudged insolvent, Merritt Sowles, the insolvent's brother, and an officer of the First National Bank of Plattsburg, took an assignment of this mortgage in the interest of the insolvent. Merritt, through the bank, furnished the money for this purpose, and the insolvent gave him or the bank his note for that amount. A suit was brought by the assignees against the Burlington Savings Bank to recover, among other things, the value of the mortgaged premises, as an illegal preference under the law of insolvency. Therein it was held that the mortgage constituted such a preference, and that it was optional with the assignees in such circumstances either to avoid the conveyance and retake the property, or suffer the conveyance to stand and recover the value of the property conveyed. It was further held that treating the mortgage as valid against the insolvency proceedings, the title to the property would still be in the assignees, subject to the mortgage lien, and that as they could redeem by paying the mortgage debt, they could recover on account of the mortgage no more than the amount of the incumbrance; and thus this item entered into the judgment rendered. *Lewis and Leach, Assignees v. Burlington Savings Bank*, 64 Vt. 626, 25 Atl. 835. By bringing such action to recover the value of the property conveyed, and

so prosecuting it to judgment, the assignees elected to allow the conveyance to stand, and they thereby affirmed the mortgage as a valid incumbrance on the property. This being all the interest the bank had under the mortgage, it was all that could be conveyed by the assignment from the bank to Merritt Sowles. *Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092. When the insolvent had given the mortgage, his only interest in the property was the equity of redemption, and this was conveyed by the Court of Insolvency to the assignees. It follows that the insolvent had no right or title in the premises to convey to his daughter Jennie P. (Sowles) Denney, and that she took none by his quit-claim deed of January 30, 1893, unless it was some interest acquired by him under the assignment of the mortgage to Merritt. The note secured by the mortgage being payable on demand, the law day had passed, and the quit-claim deed conveyed to the daughter whatever rights the insolvent had under the mortgage by virtue of this assignment. *Oakman v. Walker*, 69 Vt. 344, 38 Atl. 63. Nor did the fact that such rights did not appear of record make any difference. *Sowles v. Butler*, 71 Vt. 271, 44 Atl. 355. However, under the assignment,—which was recorded,—the mortgage stood in the name of Merritt Sowles, and he held it in trust for the insolvent until the quit-claim deed was given by him to his daughter, and thereafter it was held in trust for her.

Merritt brought and was pressing foreclosure proceedings in his own name, with the insolvent, his daughter, the assignees, and one Herbert Austin, to whom further reference will be made herein, as parties defendant. During all the time that the mortgage was so held in trust, the right of redemption was in the assignees, and they redeemed the property by purchasing the mortgage and note secured thereby, with a small mortgage given to the insolvent by Herbert Austin, and all the claims proved against the estate which had been purchased by and

assigned to Merritt, and which were owned by the First National Bank of Plattsburg, paying for the whole many hundreds of dollars more than the amount due on the first named mortgage. It does not appear that these claims proved were other than of the ordinary character of unsecured claims, the value of which depended upon prospective dividends from the estate. The fair inference is that in this purchase the mortgage to the Burlington Savings Bank was considered at the amount due thereon, and therefore paid in full by the assignees. Merritt had the right to receive the money thus paid in redemption, and to discharge, or assign to the assignees, the mortgage when redeemed. It follows that whether the quit-claim deed was notice to the assignees that the daughter claimed an interest in the mortgage debt is immaterial. None of the other claims proved against the estate which stood in the name of Merritt were secured on the land described in the quit-claim deed; hence the deed could not be notice that she claimed any interest in them.

It is argued that when the assignees redeemed the property, knowing that Merritt had taken the assignment of the mortgage in the interest of the insolvent, without discharging the note given by him to Merritt or the bank therefor, it amounted to a fraud upon the insolvent, as between him and the assignees, which should not be permitted to their advantage by giving them any interest in the property adversely to him. But no such fraud is apparent. The insolvent became the owner of the mortgage by giving his note, and the mortgage was assigned to Merritt, who held it in trust for the insolvent and later for his assign. After the trustee received payment of the mortgage debt, the money was held by him in trust just as the mortgage had been. There is no principle in law or equity requiring the assignees to discharge the insolvent's note given therefor.

For several years before the insolvency proceedings, the insolvent had been cashier of the First National Bank of St. Albans. When the petition was filed there was a suit pending in the Circuit Court of the United States in favor of the United States against the insolvent, and before the adjudication upon the petition, a judgment was rendered in the suit against him, amounting with costs to \$2,158.76. In that suit \$3,000 in bank bills were attached and a receiptor taken therefor. The bank went into the hands of a receiver in April, 1884. This judgment was proved for the United States as a preferred claim, and filed with the Court of Insolvency October 21, 1886. On March 11, 1889, the assignees petitioned the court of insolvency for leave to compromise the claim, upon an offer they had received, by the payment of \$1,515.55 as a preferred claim. Such leave was granted, and it was compromised accordingly by paying thereon the sum named. By V. S. 2107, the assignees, under the direction of the judge of the Court of Insolvency, were authorized to compound and settle the claim as was most for the interest of the estate. Whether the Court should or should not have granted such authority in this instance is a matter without the jurisdiction of the referee. Moreover, the right thus to compound and settle a claim cannot be questioned by the insolvent. *National Bank v. Waite*, 57 Vt. 608.

In winding up the affairs of the National Union Bank of Swanton, quite a large claim proved against the estate of the insolvent was ordered to be sold at auction. By an agreement between the insolvent and the assignees, the claim was bid off for the three at a price agreed upon, but assignee Lewis paid for it and owns it. There was no dispute or disagreement regarding its allowance against the estate. It was proved by the bank, so far as the case shows, without objection. If Lewis had the right to purchase and hold it personally, a question not

properly before us and upon which we give no intimation, then he stands in the place of the original creditor. But if, because of his trust relation, he could not so purchase and hold it in the circumstances of the transaction, then his purchase would enure to the benefit of the estate. In neither event was it a matter within the province of the referee.

At the time of filing the petition, Lewis had given his notes to or in the interest of the insolvent for \$6,395. The insolvent had given him a writing agreeing to pay and protect him against these notes, and, as between them, the notes were the insolvent's to pay. This claim was proved by Lewis, and voted on by his attorney. The notes were held by the First National Bank of St. Albans, and at that time suits thereon had been commenced by it against Lewis, who took no security for signing them. While the bank held the notes, and on January 14, 1884, the insolvent conveyed to it by three mortgages quite a large amount of real estate, to secure it against his liabilities of almost every character. He also conveyed to it, for like security, considerable personal property. When the receiver of the bank undertook to set up these mortgages and transfers of personal estate, Lewis claimed the security so given, if valid, enured to his benefit *pro rata*. On such claim being made, in compromise with the receiver, Lewis had to pay on the notes \$3,500. He now seeks to be paid a reasonable dividend on this sum. It is contended by the insolvent that Lewis realized from these securities \$2,895, the difference between the amount of his claim proved and the sum he paid on the notes; and that, as the security was not disposed of in the manner pointed out in the insolvent law, Lewis proved his whole claim and realized on the security also, which a creditor cannot do. *International Trust Co. v. West Rutland Marble Co.*, 63 Vt. 626, 22 Atl. 273. But we do not adopt this view. Lewis held no security to release before he could prove his claim. The securities were

held by the bank upon these notes with other liabilities of the insolvent; and under the claim of Lewis that the securities should be applied *pro rata*, the receiver so applied them; whereby to that extent the notes were paid by the insolvent whose duty it was to pay them. The balance of \$3,500 Lewis had to pay, and he should move in the Court of Insolvency for leave to withdraw his former claim and prove a claim for the sum so paid. Nor does the fact that the case does not show whether the insolvent indorsed these notes or not change the situation; for it is found that they were his to pay. Hence, as between him and Lewis, he was the principal debtor and Lewis stood in the relation of a surety; and manifestly this relation was known or recognized by the receiver of the bank in the settlement and application of the securities. This claim is within the provisions of the law by which "A person liable as bail, surety, guarantor, or otherwise for the debtor, who has paid the debt or any part thereof in discharge of the whole, may prove such debt for the amount paid, although such payments were made after the proceedings in insolvency were commenced." V. S. 2074.

In carrying out the compromise of January 31, 1889, with the receiver of the First National Bank of St. Albans, the receiver, that he might raise money to pay to the assignees, conveyed the home place and other property to Merrill J. Hill for the insolvent who now claims the Foundry Street property through that conveyance. The deed refers to the mortgage to the bank for a description of the lands conveyed. But the referee has found that the Foundry Street property was not covered by the mortgage, and that it would still be a part of the insolvent estate, except for the purchase by assignee Lewis.

On November 24, 1896, the insolvent urged assignee Leach to consent to a sale of this property for \$700. This led to an agreement later between the insolvent and the assignees

to sell it for \$1,000, and Lewis agreed to purchase. On application by the assignees, the Court of Insolvency granted leave to sell at that price, and it was conveyed by the assignees to Hill, and by him to Lewis who paid \$1,000 therefor into the estate. This was a fair price for the property at that time, and more than had been offered to the assignees by anyone else. The insolvent knew of the sale, fully approved of it, and consented to it. Lewis has since built two buildings on the premises.

In 1889, the insolvent made a proposition to the assignees for a compromise and settlement of the estate. Estimates of the available assets, of the claims proved, and of the expenses of administration were made. The assignees thought a settlement would be reached, and to that end they transferred certain claims and property to Hill, to be held by him and used in carrying out the compromise. Although Hill was not to use these transfers unless the compromise was completed, he transferred some of the claims to the insolvent, in the expectation that it would be perfected, but it was not done. The terms of the attempted compromise were never fully agreed upon. On August 2, 1894, when the affairs of the estate had somewhat changed, the insolvent submitted another proposition for a compromise and settlement. This resulted in a corrected proposal in more definite form on November 15, 1895, designated "An estimate for compromise purposes only," on the back of which was indorsed an agreement in writing signed by assignee Lewis, and by the insolvent for himself and for Merritt Sowles and the First National Bank of Plattsburg. It was therein stipulated that, after the payment of the expenses incurred by the assignees in the estate, a dividend should be declared upon the claims proved, and that the estate should be closed immediately. But it is found that the insolvent, when he signed this agreement, had no authority to bind either Merritt or the bank,

and no claim is made that either was bound thereby. Nor does the insolvent claim that the instrument, by virtue of its execution, is of binding force as between him and the assignees. It is contended, however, that when the history of the whole transaction is considered, beginning with the attempted compromise of 1889, the terms of which were not fully agreed upon, but under which both parties took through the medium of Hill, and have since retained transfers of certain property that was to be theirs when the compromise was perfected, and culminating with the "Estimate for compromise purposes only," in November, 1895, the parties here have by their own conduct so recognized and ratified the agreement that they are now mutually bound by it; and that this applies with especial force to the purchase of the Foundry Street property by assignee Lewis, upon the principle that one who accepts the terms of a deed or other contract must accept them as a whole; that he cannot accept part and reject the rest.

It was claimed for the insolvent before the referee that his consent to the purchase of the property by Lewis was given in carrying out the expected compromise. The referee finds that the expected compromise may have influenced the insolvent in giving his consent, and then adds, "but it cannot be withdrawn after the situation has been so changed that Lewis cannot be placed in *statu quo*." It is now urged that this amounts to a finding that his consent was given and continued by reason of the compromise, in reliance upon it, and for the purpose of carrying it out.

The finding that the insolvent *may* have been so influenced does not establish the fact that he *was* so influenced. It may have been otherwise, notwithstanding. When the insolvent seeks to stand upon a recognition and ratification of the compromise agreement, the burden is upon him to show such facts as will give it binding force in that way. We do not think

the language used is fairly subject to the construction contended for. What the referee says to the effect that the consent cannot be withdrawn after the situation has been so changed that Lewis cannot be put in *statu quo* is but a conclusion of law, which neither adds to nor takes from the facts found upon which the conclusion is based. Such a recognition and ratification as would make that agreement binding between the parties here does not appear.

It is further urged, in connection therewith, that if the agreement was not thus made binding, then, since the Foundry Street land was trust property, an assignee could not be a purchaser, and that anyone interested in the trust estate may avoid the sale, unless he is estopped by his own conduct from so doing. Here again reliance is placed upon the referee's findings, the claimed effect of which is that the insolvent has not so estopped himself, provided the assignee can be put back in the situation where he was before; and it is argued that he can be by being allowed for his betterments. But, as in the other instance, the construction is not warranted; and if it were, being but a conclusion of law, no fact is established thereby.

The record shows that all the claims provable and proved against the estate have been purchased or settled by the assignees with the approval of the insolvent, except the claim proved by assignee Lewis. This being so, the only parties interested in the estate, as it now stands, are the assignees, Lewis personally, and the insolvent. Lewis is the only creditor whose claim has not been thus purchased or settled, and he is not in a situation to disapprove of his own acts in the purchase of trust property. If there should be a surplus after the settlement of all claims and the payment of administration expenses, it would go to the insolvent. Assuming that such surplus exists, the insolvent stands in the relation of *cestui que trust*. It is well settled that a purchase by a trustee or other person standing

in like relation, at his own sale of trust property, is not void; but it is generally, though not always, voidable by the *cestui que trust* within a reasonable time. In a court of law, however, such a sale is treated as valid unless actual fraud is shown. No such fraud appears in connection with the sale in question. The remedy, if any, is in a Court of Chancery, where the equities may be adjusted and justice done to all parties before the Court in their different relations by a single decree with the power to enforce it. *Thorp v. McCullum*, 1 Gilmon 614; *Doe v. Henry*, 3 Ind. 104; *Dawone v. Fanning*, 2 John. Ch. 252; *Jackson v. Van Dolfen*, 5 Johns. 43; *Fox v. Mackreth*, 1 Lead. Cas. Eq., notes 256-257; *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258; *Yeackel v. Litchfield*, 13 Allen, 417.

Before insolvency proceedings were instituted, the insolvent made a contract with Herbert Austin to sell him a strip of land off that covered by the mortgage to the Burlington Savings Bank. A few days after the petition was filed the insolvent deeded this strip to Austin, and took his note for \$163, with interest annually, therefor, secured by mortgage on the land deeded. In September following, the insolvent sold the note and mortgage to his brother Merritt of whom the assignees bought them in their purchase of August 8, 1896. The fact is found that it was necessary to include them in making that purchase and settlement with Merritt and the First National Bank of Plattsburg. It is also found that the note and mortgage were a part of the insolvent estate conveyed by the Court to the assignees, and that the insolvent, by selling them to Merritt, converted them to his own use, compelled the assignees to purchase them, and should account therefor. The insolvent contends that he is not thus chargeable because the note and mortgage were subsequently paid to the assignees. But this contention is untenable. The note and mortgage were owned by the assignees as a part of the estate, and when paid

they received only the amount due on the mortgage debt. Nothing was received for what they were obliged to pay Merritt therefor. To this extent they were damaged by the insolvent's conversion, and he should account accordingly.

But it is further contended that the damages have not been assessed. The referee has found that the amount due on the note at the time the insolvent sold it was \$167.14, and from the connection of this finding with the other facts regarding the note and mortgage and the conversion of them, we think it may be fairly said that he intended thereby to assess the damages on the basis indicated. This is the more apparent from the fact that the note, when purchased by the assignees, had due upon it nearly two years more of interest which in this accounting might properly have been included in the damages had they paid Merritt the full amount then due thereon.

The referee finds that the insolvent received on the judgment against George H. Sowles \$180.06, for which he should account as of August 12, 1889. It is urged that he should not be thus held to account, for the sole reason that the item was not included in the assignees' specifications, and they did not claim it. Although the item may not have been thus included, it was allowed by the Court below, and we cannot say that such allowance was legal error.

The overruling of the motion to recommit, for the purpose stated in the amendment thereto, was within the discretion of the Court to which exception will not lie.

This disposes of all points relied on in the appellants' brief.

Judgment of the County Court reversed, and judgment that Jennie P. (Sowles) Denney has no interest in the land and premises mortgaged to the Burlington Savings Bank, by the quit-claim deed from Albert Sowles to her, dated June 30, 1893, and that said land and premises are a part of the insolvent estate in the hands of the assignees; that the insolvent,

Albert Sowles, has in his hands moneys, consisting of the various items found by the referee, amounting in the aggregate, with interest to August 21, 1902, to the sum of \$4,220.09, which he withholds from said assignees without right; and that the appellees recover their costs, except in the Supreme Court, and that in the Supreme Court the appellants recover their costs. Judgment to be certified to the Court of Insolvency.

MARY P. STOCKWELL v. TOWN OF RUTLAND.

January Term, 1902.

Present: TAFT, C. J., ROWELL, TYLER, START, WATSON and STAFFORD, JJ.

Opinion filed October 28, 1902.

Municipal corporations—Acts done in public capacity—Liability for injuries by.

A town which, by act of the legislature, acquires territory in which is laid an aqueduct of iron pipe, takes and holds the pipe in its public capacity, though it is being taken up to be sold for want of other use for it; and such town is not liable to a person injured by falling into an unguarded and unlighted ditch dug for the purpose of so removing the pipe.

CASE FOR NEGLIGENCE. A demurrer to the declaration having been overruled, the defendant pleaded the general issue. Trial by jury at the March Term, Rutland County, 1901, Munson, J., presiding. Verdict and judgment thereon for the plaintiff. The defendant excepted.

Joel C. Baker for the defendant.

The doctrine of *respondeat superior* does not apply, since the defendant was acting in a governmental capacity, and no liability can be imposed upon the town except by statute. *Welsh v. Rutland*, 56 Vt. 228; *Bates v. Rutland*, 62 Vt. 178; *Aitken v. Wells River*, 70 Vt. 308.

The plaintiff was a traveller upon the highway, and her accident resulted from an insufficiency in the highway, and for such, no action lies. *Parker v. Rutland*, 56 Vt. 224; *Weller v. Burlington*, 60 Vt. 28; *Bates v. Rutland*, *supra*; *Hill v. Boston*, 122 Mass. 344.

The defendant is not liable since the work of taking up the pipe was being done by the contractor, Pokrywka. *Gaslight Co. v. Norwalk*, 63 Conn. 522; 1 S. & R. on Neg. s. 168.

Butler & Moloney for the plaintiff.

The town acquired title to this water pipe by act of the legislature. When it attempted to remove the same from the street, it was not acting in a public capacity, but for its private benefit. *Winn v. Rutland*, 52 Vt. 481; *Welch v. Rutland*, 56 Vt. 228; *Jones v. New Haven*, 34 Conn. 1.

The contractor was engaged to excavate the pipe at a certain price per length, and he was under the supervision and control of the selectmen. He was but the servant of the defendant. The town is therefore liable. *Bus. Per. Inj.* 50; *Detroit v. Corey*, 9 Mich. 165; *Railroad Co. v. Hanning*, 82 U. S. 649; *Homan v. Stanley*, 66 Penn. St. 464.

ROWELL, J. This is case for negligence in leaving improperly lighted and guarded an open ditch in a highway, into which the plaintiff fell, dug for the purpose of taking up dis-used water pipe, to which the defendant acquired title under No. 190 of the Acts of 1894, annexing a part of the city of Rutland to the town of Rutland, and providing that the public

property of the city in the annexed territory should become the property of the town, and that the town should pay to the city, among other things, the cost of the water mains the city had laid in said territory, and the cost of laying the same, but silent as to what use the town should make of the pipe.

The court overruled defendant's motion for a verdict, treated the act as authorizing the town to secure to itself the value of the property thus transferred, and charged that if the town was digging up the pipe to be used for highway purposes, it was not liable, however negligently the work was done; but if it was digging it up without reference to its duty to the public regarding highways, but for the purpose in the first instance of converting it into money for the benefit of its treasury, it would be liable, if the case was otherwise made out.

The defendant says it was error to overrule its motion, and to submit the case to the jury, for that the evidence did not tend to show that the pipe was being dug up to sell, but only to be used for highway purposes; and for that the act conferred upon the town no authority to use the pipe for its private gain and advantage, nor for any purpose outside of its governmental agency.

The distinction drawn by the charge is well settled, namely, that municipal corporations proper are not liable when acting in their public and governmental capacity, unless made so by statute; but are liable when acting in their private and non-governmental capacity, the same as corporations aggregate and natural persons. But the question here is whether the defendant was acting in its private and non-governmental capacity in digging up this pipe for the purpose in the first instance of converting it into money for the benefit of its treasury. There were thirty-seven or thirty-eight lengths of it in all, about 450 feet, some of it 8-inch, and some of it 6.

The question of when a municipal corporation is acting in its private capacity so as to make it liable, has frequently been before this Court and is pretty well settled. *Winn v. The Village of Rutland*, 52 Vt. 481, is a leading case on the subject. There the village was held liable for damage occasioned by its negligence in constructing a sewer through plaintiff's land. The decision was put upon the ground that as the village had asked for and obtained charter authority to build and maintain sewers, not for the purpose of discharging a governmental duty, but of benefiting its inhabitants, the authority carried with it an implied obligation on the part of the village to use it so as not to injure others, and that the true principle of liability was found in that obligation.

In *Welsh v. The Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 762, it is said that when municipal corporations are exercising private franchises, powers, and privileges belonging to them for their corporate benefit, or are dealing with property held by them for their corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public, they are liable for negligent exercise of such powers the same as individuals are.

There is nothing in the case at bar to show that the defendant asked to have this territory annexed to it, but for aught that appears it was done without its consent and against its will. The act dealt with the town in its public and governmental capacity, and not otherwise, for all its provisions were compulsory upon it; and the town took the territory in the same capacity, and could have taken it in no other; and the pipe, being a mere incident of the transaction, followed the principal, and the town took that in its public capacity, for the State does not force things upon municipalities in their private capacity, but waits to be asked to confer them. Indeed it has been held that the State cannot do that. In *People, ex. rel. Board of Park*

Commissioners v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202, it was held that the legislature could not compel a municipal corporation to contract a debt for local purposes against its will, any more than it could compel a private corporation or an individual to contract a debt. The Court said it would be as easy to justify on principle a law that permits the rest of the community to dictate to a man what he shall eat, as to justify one that permits the people of other parts of the State, through their representatives, to dictate to a municipal corporation what it shall do in respect of private and non-governmental matters. The same thing was held in *People v. The Mayor of Chicago*, 51 Ill. 17, 2 Am. Rep. 278, and upon much the same reasoning. *People v. Batchelder*, 53 N. Y. 128, 13 Am. Rep. 480, is to the same effect; and so is *Atkins v. Randolph*, 31 Vt. 226.

Now to say that the town, having been compelled to take and pay for this pipe in its public capacity, is to be treated as holding it in its private capacity merely because, having no other use for it, we may suppose, it intends to sell it in order to reimburse its cost, would be changing the legal relation of the town to the property, and making a matter of public concern into a matter of purely private concern, and quite overleaping the true principle of liability stated in *Winn v. Rutland*.

In *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, the town of Barre, having built a new town hall, repaired its old town hall for renting, having no other use for it; and it was held that it might lawfully do that, and raise a tax to pay for it, it not being its primary object to invest money in buildings to rent, but only to make the best and most advantageous use of property already on hand. The principle of that case is applicable here, and is decisive of the case in favor of the defendant, and therefore its other exceptions need not be considered.

Reversed and remanded.

LUCY A. NYE v. H. B. DANIELS.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed November 4, 1902.

Conditional sale—Lease—Taking possession—Rights of assignee—Conversion—Receipt as evidence—Postmaster as witness—Postal regulations—Harmless error.

A contract in the form of a lease of personal property, which acknowledges receipt of a certain sum and provides that when a certain other sum is paid the lease will be fully satisfied, is a conditional sale.

A conditional vendor may sell his interest in the property and the contract, subject to the rights of the vendee which he does not disturb, and such sale is not a conversion of the property.

When the contract provides that the vendor may, upon default of the vendee, "repossess" the property, the vendor's assign is subrogated to this right; and merely taking possession of the property will not be a conversion, if the vendee is in default.

A receipt purporting to be signed by a manager is not admissible without evidence that he signed it.

The plaintiff's statement in the opening of her case, that she owned the machine in question, became immaterial and harmless when the written contract was put in and made the basis of recovery.

A postmaster cannot be compelled to testify whether a certain registered letter was sent through his office.

TROVER for a sewing machine. Plea, the general issue. Trial by jury at the December Term, 1900, Caledonia County, Taft, C. J., presiding. The court ordered a verdict for the plaintiff for the value of the machine, and only submitted to the jury the question of its value. Judgment on verdict. The defendant excepted.

Harland B. Howe for the defendant.

It was error to allow the plaintiff to testify that she was the owner of the machine. All the title she had was in writing, and the writing was the best and only evidence.

It was error to admit in evidence the pretended final receipt, purporting to be signed by McLaughlin, Manager. There was no evidence whatever that it was McLaughlin's receipt. Besides the defendant purchased the machine with the contract on December 11th,—with notice to the plaintiff,—and the payment evidenced by the pretended receipt was not until the 11th of the following February. After the sale to the defendant and the notice to the plaintiff, the Singer Company or its agents, had no power to execute any receipt which would bind the defendant. 1 Greenl. Ev. s. 190; *Bullard v. Billings*, 2 Vt. 309.

The postmaster should have been compelled to testify. The evidence asked of him did not come within the prohibition of the postal regulations.

The Court erred in construing the lease as a conditional sale. This contract is not like the one involved in *Whitcomb v. Woodworth*, 54 Vt. 544, or *Collender Co. v. Marshall*, 57 Vt. 232, or *Singer Mfg. Co. v. Nash*, 70 Vt. 434. In each of those cases a sale could be inferred from the language of the contract, but here a sale cannot be inferred from the contract itself, without doing violence to the language therein used.

N. A. Norton for the plaintiff.

The contract in question is nothing more or less than a conditional sale. *Whitcomb v. Woodworth*, 54 Vt. 544; *Collender v. Marshall*, 57 Vt. 232; *Singer Mfg. Co. v. Nash*, 70 Vt. 434.

The contract being a conditional sale the company had no right to sell and the defendant no right to buy otherwise than

in accordance with V. S. 2293. *Roberts v. Hunt*, 61 Vt. 612; *Smith v. Wood*, 63 Vt. 534.

This defendant had no better right than the company. His purchase and refusal to deliver upon demand showed a conversion.

The postmaster could decline to testify in obedience to the postal regulations to which he called the Court's attention.

The plaintiff could testify that she owned the machine. The sale was oral, the lien reserved alone being in writing.

ROWELL, C. J. The contract under which the plaintiff claims title to the sewing-machine in question, was made with The Singer Manufacturing Co., by Wm. McLaughlin, Manager. It acknowledges the receipt of \$17.00, and says that "there yet remains \$43.00 to be paid" by the plaintiff before she "will complete the payments called for by the lease," which she agrees to pay at the rate of \$3.00 a month until paid. Coupon receipts were to be given for the payments, and "when they amount to \$43.00, the lease will be fully satisfied." The machine is to remain the property of the company, and not to be removed from its then present location without the permission of its St. Johnsbury office, and on failure of the plaintiff to keep her agreement, the company has the right to "repossess the machine," and a discount of ten dollars was to be made for payment in five months.

We quite agree with the trial Court that this is a conditional sale and not a lease, as it affects to be. The obvious intent and meaning of the contract is, that when it is "fully satisfied" by payment of the \$43.00, the machine shall be and remain the property of the plaintiff, free from the company's interest therein.

But as the contract gives the company the right to take possession of the machine on failure of the plaintiff to pay as

agreed, the defendant has the same right, as he has bought the company's interest in the machine and the contract, and thus has become subrogated to its rights. Hence the decisive question is, whether the plaintiff had fully paid for the machine in a way to bind the defendant, before he took it, as she claims, or whether there was then a balance due, as the defendant claims. But this question was not submitted to the jury, as the Court directed a verdict for the plaintiff because the company did not sell the machine according to the statute, and therefore was guilty of a conversion in selling to the defendant, and the defendant guilty in taking possession. But this was error, for by selling to the defendant as it did, the company was not guilty of a conversion, as it did not take possession, nor exercise other dominion or control, of the property. A conditional vendor can sell his interest in the property and the contract, subject to the rights of the vendee, which he does not disturb, the same as one may in like manner sell his interest in any other property. *Thorp v. Robbins*, 68 Vt. 53, 33 Atl. 896, is analogous.

It was error to admit the receipt of payments purporting to be signed by McLaughlin as manager, as there was nothing to show that he signed it.

The plaintiff's testimony at the opening of her case that she owned the machine, became immaterial and harmless when the contract was put in and made the basis of recovery.

The Court was right in refusing to compel the postmaster to testify whether the plaintiff sent a registered letter through his office to the Singer Co. at Burlington in February, 1898. By Sec. 462 of the "Postal Laws and Regulations" of 1893, then in force, the witness was forbidden to furnish that information, under penalty of removal. That regulation had the force of law, it not being inconsistent therewith, as it was authorized by Sec. 161 of the Revised Statutes of the United States, by which the head of each department is authorized to

prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, etc. *United States v. Eliason*, 16 Pet. 291; *Landram v. United States*, 16 Ct. Claims, 74; *Gratiot v. United States*, 4 How. 80, 117; *United States v. Ormsbee*, 74 Fed. Rep. 207; *In Re Hirsch*, Id. 928; *Hickey v. Huse*, 56 Me. 493.

Judgment reversed and cause remanded.

JOHN H. POOLE v. MASSACHUSETTS MUTUAL ACCIDENT ASSOCIATION.

October Term, 1902.

Present: ROWELL, C. J., MUNSON, START, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed November 17, 1902.

*Accident insurance—Action on policy—Defenses—Pleas—
Motion to file.*

A defense which must be specially pleaded cannot, without the proper plea, be insisted upon, though it appears from the evidence necessarily introduced.

In an action on an accident policy, under No. 121, Acts of 1896, the defense that the insured did not exercise due diligence for his personal safety and protection as required by the policy, cannot be made available unless specially pleaded.

Permission to file a plea in this Court will only be granted when it is certain that the case has been tried as it would have been if the plea had been in.

GENERAL ASSUMPSIT on an accident insurance policy. Pleas, the general issue and payment. Trial by jury at the June Term, 1901, Caledonia County, Tyler, J., presiding.

Judgment for the defendant on verdict ordered. The plaintiff excepted.

Harland B. Howe for the plaintiff.

It was error to order a verdict for the defendant on the ground that the plaintiff was not in the exercise of due diligence. An injury through violent and accidental means having been proved, the burden was on the defendant to show want of due diligence. *Freeman v. Travellers Ins. Co.*, 144 Mass. 572; *Badenfield v. Mass. Acc. Asso.*, 154 Mass. 77; *Keene v. N. E. Acc. Asso.*, 161 Mass. 149.

This defense could not be made under the defendant's plea of the general issue. The provisions in regard to due diligence was one of the conditions and provisos of the policy. *Commonwealth v. Hart*, 11 Cush. 130; *Freeman v. Travellers Ins. Co.*, *supra*; *Pedmont Ins. Co. v. Ewing*, 92 U. S. 377; No. 121, Acts of 1896.

The Court cannot say, as matter of law, that the plaintiff was not using all due diligence for his personal safety and protection. *Keene v. Association*, *supra*.

The tender which the defendant made to the plaintiff was in law an admission of the legality of the plaintiff's claim, denying only the amount due, and so with the evidence of tender admitted, the Court was bound to submit to the jury the question of the amount due. *Woodward v. Cutter*, 33 Vt. 49.

It was certainly error to order a verdict for the defendant, because the policy provides that in case the injury is caused by or contributed to by the negligence of the insured the indemnity shall be one-fifth of that named in the policy. So, conceding that he was not in exercise of due care, the plaintiff would be entitled to recover one-fifth of the indemnity specified.

Dunnett & Slack for the defendant.

A stipulation in the policy required the plaintiff to use due diligence for his personal safety and protection; so whatever would constitute contributory negligence in an action of tort may be set up as a defense to the action on this contract. *Sawtelle v. Ry. Pass. Assur. Co.*, 15 Blatch. 216; *Tuttle v. Ins. Co.*, 134 Mass. 175; *Ins. Co. v. Langden*, 60 Arkansas, 381.

The case shows that the plaintiff was not in the exercise of due care, and the Court was right in ordering a verdict for the defendant. *Smith v. Accident Association*, 67 N. W. 990; *Follis v. Accident Association*, 62 N. W. 907; *Accident Association v. Taylor*, 71 Ill. App. 132; *Beam v. Assur. Corp.*, 50 Mo. App. 459; *Cornish v. Ins. Co.*, 23 Q. B. 453; *Willard v. Association*, 169 Mass. 288; *Worthington v. Railroad Co.* 64 Vt. 107.

MUNSON, J. No. 121, Acts of 1896, provides that in actions brought to recover on a fire, life or accident insurance policy, the general counts in assumpsit shall be a sufficient declaration, and that the plea of non-assumpsit shall put in issue only the execution of the policy and the amount of damages sustained. This suit is brought upon an accident policy; the declaration consists of general counts adapted to the cause of action; and the pleas are the general issue and payment. The policy required the insured to use all due diligence for his personal safety and protection, and the defense relied upon was his failure to exercise the diligence so required. At the close of the plaintiff's evidence the defendant moved for a verdict on the ground that the evidence disclosed no right of action, and a verdict was directed accordingly.

The Act of 1896 was evidently not referred to, and the result was the direction of a verdict upon an issue that was not within the scope of the pleadings. The Act precluded the de-

fendant from relying on this defense unless specially pleaded, and that which must be specially pleaded cannot be proved nor insisted upon, if it casually appears. The fact that the matters which are claimed to constitute the defense appear from evidence necessarily introduced to make out the case, will not enable the defendant to avail himself of them. The evidence received is to be regarded only as bearing upon the issue joined. *Allen v. Parkhurst*, 10 Vt. 557; *Walker v. Hitchcock*, 19 Vt. 634; *Briggs v. Mason*, 31 Vt. 434.

The defendant's suggestion that it be permitted to file the necessary plea at this time cannot be acted upon. That course can be taken only where it is certain that the case has been tried as it would have been if the plea had been in. If this case had taken the usual course the plaintiff might have offered further evidence in rebuttal. *Chaffee v. Rutland R. R. Co.* 71 Vt. 384, 45 Atl. 750; *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633.

Judgment reversed and cause remanded.

LUTHER BAKER, ET AL. v. F. M. SHERMAN, ET AL.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON and
HASLTON, JJ.

Opinion filed November 17, 1902.

Pleading—Confession and avoidance—General denial.

A plea of avoidance is sufficient if it contains an implied admission of the truth of the allegations replied to.

A rejoinder, which admits that a suit terminated in an arrest of judgment as set forth in the replication to a plea of the statute of limi-

tations, but alleges that such termination resulted from the voluntary action of the plaintiff, is a plea of avoidance and does not amount to a general denial.

CASE. Heard on the plaintiffs special demurrer to the defendants' rejoinder at the March Term, 1902, Franklin County, Tyler, J., presiding. Demurrer sustained, *pro forma*, and rejoinder adjudged insufficient. The defendants excepted.

Rustedt & Locklin, Farrington & Post, and Young & Young for the defendants.

The plea of the statute of limitations is a bar to the action unless the plaintiffs can escape its effect by virtue of V. S. 1214. This statute does not apply in any case where the plaintiff voluntarily abandons his first suit. *Hayes v. Stewart*, 23 Vt. 622, and numerous other cases in this state and elsewhere.

The first special cause of demurrer alleges that the defendants claim that the first action was determined and ended in a different way than claimed by the plaintiffs. This allegation is not supported by the facts. The defendants admit that the suit ended in the way claimed by the plaintiffs, but allege that this came about through the voluntary act of the plaintiffs. Although the County Court entered a judgment in arrest, such judgment was the result of the deliberate choice and election of the plaintiffs. *Carroll v. Railroad Co.*, 60 Fed. R. 549.

George W. Burleson, A. A. Hall and H. H. Powers for the plaintiffs.

A special demurrer is the proper method of raising the objection here urged. Chitty Pl. 572; *Hotchkiss v. Ladd*, 36 Vt. 593.

The replication sets up the termination of the former suit by an arrest of judgment on a verdict for the plaintiffs. The

defendants should traverse, or confess and avoid this allegation. The rejoinder does neither. It says, in effect, that said former suit was terminated in a different manner, and concludes with a verification. This is saying that the former suit was not terminated as the plaintiffs say it was. The replication brings the case within the purview of V. S. 1214.

MUNSON, J. Case for fraudulent representations in the sale of land; plea, the statute of limitations; replication, that a prior suit seasonably brought was terminated by an arrest of judgment on verdict for the plaintiffs, and that this suit was brought within one year thereafter; rejoinder, that the judgment of arrest was entered upon the exercise of an option given plaintiffs by a judgment order of the Supreme Court; rejoinder specially demurred to as amounting to the general issue.

The rejoinder confesses in the usual form the proceedings alleged as preliminary to the judgment of the Supreme Court; denies that the judgment of that Court was as alleged in the replication; and, after stating certain matters of avoidance, sets up the subsequent judgment of the County Court in terms which correspond with the allegation of the replication, but without formally confessing the judgment as alleged or its finality. The rejoinder also shows, by way of avoidance, that the Supreme Court granted a new trial upon terms, and ordered an arrest of judgment if a new trial upon those terms was not desired; that, in the vacation following the entry of the case on remand, the plaintiffs, by notice in writing, declined to accept a new trial on the terms imposed, and elected to have judgment arrested; and that the judgment afterwards entered in the County Court was rendered in pursuance of that election.

The only point made by the plaintiffs is that the rejoinder amounts to a general denial. It is said that the replication sets

up the termination of the former suit by an arrest of judgment, and that the rejoinder does not confess and avoid this allegation, but alleges that the suit was terminated in a different manner. We think this view of the rejoinder is incorrect. Its allegation of the judgment of the County Court is identical in substance with that of the replication, and its recital of the proceedings shows that the judgment was one necessarily final. It is not essential that the confession be made in terms. It is said in *Chitty* that a plea of avoidance must contain either an express or an implied admission that the allegations replied to are true. It was considered in *Blood v. Adams*, 33 Vt. 52, that the question was whether the language of the plea could fairly be construed as an admission of the act complained of. It is clear that the allegations before set forth impliedly admit the ending of the suit as alleged. The later allegation that the action was voluntarily abandoned and did not fail by reason of a judgment in arrest, is not inconsistent with this construction. This allegation is not to be taken as a denial that the judgment in arrest terminated the suit, but as an assertion that that judgment resulted from the voluntary action of the plaintiffs. The pleader admits the simple fact of the disposition of the case by a judgment in arrest, but alleges antecedent matter which is relied upon to deprive that judgment of the effect it would otherwise have. It is not necessary to consider whether the matter so pleaded could have been shown under a general denial. The distinction between a plea that amounts to the general issue, and one disclosing matter that may be given in evidence under the general issue, was pointed out in *Kimball v. Boston etc. R. R. Co.*, 55 Vt. 95. It has always been held that "special matter of fact intermixed with matter of law, though it might be given in evidence on the general issue, may be pleaded specially." *Hussey v. Jacob*, 1 Ld. Raymond, 87; *Warner v. Wainsford*, Hob. 127; *Sarsfield v. With-*

erly, 2 Vent. 292; *James v. Fowks*, 12 Mod. 101; *Hallitt v. Birt*, 12 Mod. 121; *Paramour v. Johnson*, 12 Mod. 376; *Carr v. Hinchcliffe*, 4 B. & C. 547; *Maggs v. Ames*, 4 Bing. 470. It is explained in *Hallitt v. Birt*, that "matter in law" as here used, does not mean a question in law, but a thing which in law avoids the cause of action.

The matter is in no way complicated by the defendants' denial of the judgment of the Supreme Court as pleaded by the plaintiffs. In the plaintiffs' pleading, the allegation of that judgment is but matter of inducement; while the judgment alleged to have been finally rendered by the County Court is a complete support of their contention, unless met by some matter of avoidance. But the defendants' contention is based wholly upon the judgment of the Supreme Court; and the terms of that judgment and the action of the plaintiffs under it, together, constitute their matter of avoidance. The defendants can therefore deny the allegation touching the judgment of the Supreme Court, and confess and avoid the judgment of the County Court, and a confession of that will be sufficient, for that is the gist of the replication. The admission of that judgment gives the plaintiffs an apparent right, and makes the rejoinder a plea of avoidance.

Pro forma judgment reversed, demurrer overruled, rejoinder adjudged sufficient, and cause remanded.

HASELTON, J., dissents.

E. G. & S. C. GREEN v. JAMES McDONALD, O. A. BURTON
AND E. A. SOWLES.

October Term, 1901.

Present: ROWELL, TYLER, WATSON and STAFFORD, JJ.

Opinion filed November 17, 1902.

*Findings of special master—Equitable liens—Jurisdiction—
Subrogation—Offset—Questions of fact.*

The finding that a party ratified an act, so far as a certain agreement made ratifies it, is not a finding of the fact of ratification, but a submission of that question to the Court.

Though equity sometimes raises liens without agreements, based either upon general considerations of justice, or upon the principle embodied in the maxim that he who seeks equity must do equity, it is in cases in which the aid of a Court of equity must be requisite to the owner, so that he can be compelled to do equity, or in which there is some element of fraud as a ground of equitable relief.

A creditor whose debt is assumed by a third person, cannot bring an action at law on the contract of assumption, but in equity is subrogated to all his debtor's rights under such contract.

The claim of one so subrogated is subject to such offsets as would be available against the original debtor.

When one agrees, upon a valid consideration, to pay and discharge the debt of another, and fails to do so, the other may sue on the agreement, though he has not paid the debt.

The recital in a mortgage of a debt due from mortgagor to mortgagee is *prima facie* evidence of it; but its existence is a question of fact to be determined by the trier.

APPEAL IN CHANCERY. Decree was rendered in the cause in January, 1900, and various proceedings were had in order that the defendants might obtain a hearing in the Supreme Court, but without avail. An appeal was dismissed for that it was not taken within the time required. At the March Term, 1901, Franklin County, Taft, Chancellor, presiding, on the defendants' motion, the cause was brought forward, the decree

stricken off, and new decree rendered dismissing the bill as to the defendant McDonald, and for the orators against the other defendants. The defendant Sowles and the defendant Burton's administrator appealed.

E. A. Sowles and Farrington & Post for the defendants.

The defendant McDonald is estopped, and the orators claiming by way of subrogation are likewise estopped. *Shaw v. Beebe*, 35 Vt. 208; *Soper v. French*, 47 Vt. 368; *Gerrish v. Bragg*, 55 Vt. 330; *Martin v. Railroad Co.* 83 Mo. 104.

In order to create a lien where a trust has once attached, the burden of proof is on the orator to show that the property had been discharged from the trust. *Flint v. Strahan*, 36 Vt. 210.

The property being held in trust could not be pledged for or charged with any lien in favor of McDonald or the orators. *Willey v. Bank*, 47 Vt. 546; *Abel v. Howe*, 43 Vt. 403; *Birch v. Ware*, 15 Pet. 98.

If the orators have any rights, it is because McDonald had such rights. The condition of the chattel mortgage shows that McDonald was then owing Burton and Sowles the sum of \$3,412.30 for money already advanced to him. There is nothing to show that this debt has ever been paid. The orators could not get any interest in the property until this claim was satisfied.

Alfred A. Hall for the orators.

As the case now stands the orators are entitled to a mechanic's lien. In the last report of the special master, the findings which were lacking in the case as it appears in 70 Vt. 376, are supplied.

An equitable lien arises in favor of the orators. The defendants have taken the benefit of the expenditures and received

the insurance obtained thereon, and having taken the benefit they should pay the expense.

ROWELL, J. When this case was here in 1897,—70 Vt. 372,—it was held that the orators were not entitled to relief under the mechanic's liens, because there was no finding that McDonald was authorized to charge the interest of Burton and Sowles with the repairs made by the orators. But the orators now claim that there is such a finding, and refer for it to the master's last report, made in September, 1899, where it says that as far as the act of Burton and Sowles in agreeing to pay the orator's debt as a part of the consideration of the chattel mortgage of June 30, 1881, was a ratification of McDonald's action in creating the debt, they then and there ratified and confirmed such action.

But this is not a finding of the fact of ratification, but a submission of the question to the Court as matter of law. The Court had the same facts before it before, and it was for it to say whether they amounted to a ratification or not, and it said, in effect, that they did not. The case not being varied on this point by any additional findings, the former decision is conclusive against relief under the mechanics' liens.

The orators further claim an equitable lien on the fund in the hands of the receiver, because, the master having found that their industrial accessions to the building were necessary to fit it for a shirt-factory, and were specially mentioned in and covered by the insurance policies on which part of the fund was received, it would be inequitable to permit the defendants Burton and Sowles or any other creditors to hold the insurance money derived from such accessions.

It is said that the theory of equitable liens has its foundation in contracts, express or *quasi*, that deal with specific property, or are in some way related to it. But here is no such con-

tract with Burton and Sowles. There are, however, instances where equity raises liens without agreements, based either upon general considerations of justice, or upon the principle embodied in the maxim that he who seeks equity must do equity, that is, must recognize and admit the equitable rights of the other party directly connected with, or arising out of, the same subject matter. Thus, the right to reimbursement from the owner, and an equitable lien on the property benefited as security therefor, have been extended to cases where a party innocently and in good faith, though under a mistake as to the condition of the title, makes improvements, repairs, or other expenditures that permanently increase the value of the property, so that the real owner, when he seeks the aid of equity to establish his right to the property itself, or to enforce some equitable claim upon it, having been substantially benefited, is required, on principles of justice and equity, to reimburse the expenditure to the extent he has been benefited thereby.

But in order for this, in any case of this general kind, either the aid of a Court of equity must be requisite to the owner, so that he can be compelled to do equity, or there must be some element of fraud in the matter as a ground of equitable relief. 3 Pom. Eq. Jur. § 1241, and note; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486, 493. It follows, therefore, there being no contract here giving a lien; the defendants not being actors; and no fraud being shown whereby Burton and Sowles induced the orators' expenditures,—that an equitable lien cannot be decreed.

It appeared when the case was here before, as it does now, that Burton and Sowles agreed with McDonald to pay his debt to the orators, and received a chattel mortgage from McDonald securing the amount to be paid; and it was then held that in equity the orators could avail themselves of the rights accruing to McDonald under that arrangement, and said that as the

situation might be such that they would derive some benefit from a decree, the bill would not be dismissed, but the cause would be remanded, to afford an opportunity for such amendments of the bill as might enable the orators to avail themselves of the case found, and it was ordered accordingly. The case stands no different now on this point than it did then, and therefore the former decision must stand, the effect of which is, that by that arrangement, as between the parties thereto, Burton and Sowles became primarily liable for the orators' debt, and McDonald became their surety.

In some of the States, the party beneficially interested in a contract may sue upon it at law in his own name. But in this State, as well as in England, an action at law can be maintained only by the party having the legal interest, that is, the party to whom the promise is made. The orators, therefore, cannot sue at law on this contract of assumption, but their only remedy is in equity, where their rights do not arise from the contract of assumption, but result from an application of the doctrine of subrogation, and McDonald having become a surety, the orators, as creditors of his principals, are entitled by subrogation to succeed to his rights against them at the time the bill was brought; and their rights are measured and limited by his rights, for they can stand only in his shoes. *Keller v. Ashford*, 133 U. S. 610; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Wyckoff v. Noyes*, 36 N. J. Eq. 227, 231; *Knapp v. Sturgis*, 36 Vt. 721, 729; 3 Pom. Eq. § 1207.

It follows, therefore, that the orators can have no personal decree against Burton and Sowles for the amount of their debt, unless McDonald had a right to such a judgment when the bill was brought,—*Crowell v. Currier*, 27 N. J. Eq. 152,—and that McDonald had such right is clear, although he had not

paid the debt, for Burton and Sowles' promise was to pay and discharge, not merely to indemnify and save harmless, and the rule is, deducible from many cases, that a positive agreement to do an act that is to prevent damage to the plaintiff, will sustain an action when the defendant neglects or refuses to do the act. *Hunt v. Amidon*, 1 Hill, 147; *Rector etc. of Trinity Church v. Higgins*, 48 N. Y. 532; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Evarts v. Bostwick*, 4 Vt. at page 352. Serjeant Williams says that *non damnificatus* cannot be pleaded to debt on bond conditioned to discharge or acquit the plaintiff from some particular thing, for there the defendant must set forth affirmatively the specific manner of performance. 1 Saund. 117, note (1). Accordingly it was held in *Holmes v. Rhodes*, 1 B. & P. 638, that *non damnificatus* was no answer to debt on bond conditioned for the payment of a sum of money at such a time. In *Loosemore v. Radford*, 9 M. & W. 657, the plaintiff and the defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the note on a given day, but made default; and it was held in an action on the covenant that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages. ALDERSON, B., said the case resembled that of an action of trover for title-deeds, in which the jury may give the full value of the estate to which they belong, by way of damages, although they are generally reduced to 40s. on the deed's being given up. See, also, *Toussaint v. Martinnant*, 2 T. R. 100; *Martin v. Court*, Id. 640; *Hodgson v. Bell*, 8 T. R. 97; *Penny v. Fay*, 8 B. & C. 11. In *Lethbridge v. Mytton*, 2 B. & Ad. 772, the defendant, by a settlement made upon his marriage, conveyed an estate on certain trusts, and covenanted with the trustees to pay off incumbrances thereon to the amount of £19,000 within a year; and it was held, on his failure to do

so, that the trustees could recover the whole £19,000 in an action of covenant, although no payment had been made by them, and no special damage laid nor proved. But see *Ayers v. Dixon*, 78 N. Y. 318, and 3 Pom. Eq. § 1207, for a different doctrine.

But as Burton and Sowles could, in an action by McDonald against them, set off any indebtedness of his to them, they can avail themselves here of such indebtedness by way of defense, for as the orators cannot recover in their own right, but only in McDonald's right, they are subject to the defense of set-off. But it is not found that there is any such indebtedness. It is true that in the condition of the chattel mortgage, McDonald admits an indebtedness to them of \$3,400. It is also true that this admission, with nothing to oppose it, is sufficient to establish the fact of such indebtedness, and therefore is *prima facie* evidence of it; but the master does not find the fact, and we are not at liberty to infer it. The rule is that when the amount of evidence sufficient to establish a fact is not fixed by law, it must be left to the jury or other trier to determine what conclusion is to be drawn from it. Thayer's Prel. Treat. Ev. 333, 542, note 1. And the \$6,500 mentioned in the condition of said mortgage, which it says Burton and Sowles "have obligated themselves to pay or assume" for McDonald, "or shall thereafter pay or assume" for him, stand in the same way, there being no finding of such obligation, payment, or assumption, except the assumption of the orators' debt, which is included in the \$6,500. As the case is presented, therefore, the orators are entitled to a decree for the amount of their debt. But as there is nothing in the case enabling us to say as matter of law that there is no indebtedness from McDonald to Burton and Sowles, and as the report discloses evidence tending to show that there is, we do not order a decree for the orators' debt, lest injustice be done to the defendants, but send the case back in a way that

it may be ascertained whether McDonald owed Burton and Sowles at the time the bill was brought.

The orators are entitled to whatever advantage they can derive in McDonald's right under the mortgage; and that would seem to be limited to the insurance money in the hands of the receiver, derived from the property covered thereby that was burned, as the rest of the property has been used up or is worthless. But there is no finding as to the amount of that money. An account of it, therefore, will have to be taken, if the orators' debt is not extinguished by set-off.

The defendant Sowles makes many questions on his motions to recommit and to suppress, and his exceptions to the report. But most of them relate to points decided in his favor, and the others are not sustained.

Reversed and remanded, with mandate.

G. L. JOHNSON v. W. W. CATE.

May Term, 1902.

Present: ROWELL, C. J., START, WATSON and HASELTON, JJ.

Opinion filed November 18, 1902.

False representations—Knowledge—Erroneous charge.

A false statement is fraudulent when the maker of it passes off his belief as knowledge of the fact stated.

An erroneous charge requires a reversal, unless it appears that the verdict was not influenced thereby.

GENERAL ASSUMPSIT. Plea, the general issue. Trial by jury at the December Term, 1901, Caledonia County, *Munson*.

J., presiding. Verdict and judgment thereon for the defendant. The plaintiff excepted.

Dunnett & Slack for the plaintiff.

It was not necessary that the defendant should know of the falsity of his statement relative to the settlement of the Gray, Howe & Stebbins claim. If the plaintiff was damaged by the false statement, he is entitled to relief. *Company v. Burns*, 71 Vt. 354; *Varnum v. Highgate*, 65 Vt. 416; *Garlan v. Bank*, 9 Mass. 408; *Bank v. Bank*, 3 Mass. 74.

The plaintiff was not at fault; the defendant told him that Gray, Howe & Stebbins were still owing him those items, whereas, they had in fact been adjusted. This was sufficient to entitle the plaintiff to recover, and the addition to the charge necessitating that "the defendant knew" that the matter had been adjusted to make a ground for recovery is clearly erroneous.

May & Simonds for the defendant.

The charge in reference to the defendant's knowledge of the terms of settlement with Gray, Howe & Stebbins was correct. Clark on Contracts, 338; *West v. Emery*, 17 Vt. 583; *Bond v. Clark*, 35 Vt. 577.

It will be remembered that upon the defendant's theory of the case, the misstatement, if any, was immaterial, since the lumber and saw were sold directly to the plaintiff. So it does not appear that the error in the charge, if error there was, affected the verdict. So the verdict must stand. 37 Vt. 99.

HASELTON, J. This was an action of general assumpsit. Trial was had by jury. A general verdict for the defendant was returned, and judgment was rendered thereon. The plaintiff's specification set out that he had been guarantor of a debt owed to the defendant by the firm of Gray, Howe & Steb-

bins, of Boston, that said firm had paid the debt, and that thereafter, in a settlement between the plaintiff and the defendant, the plaintiff had paid and allowed to the defendant the amount of said debt by reason of, and in reliance upon, false and fraudulent representations made to the plaintiff by the defendant to the effect that said Gray, Howe & Stebbins had not paid the debt.

The plaintiff's evidence tended to show that said debt had been paid by him, and that prior to said payment by him, said firm had a full and complete settlement and adjustment of all its dealings with the defendant, which dealings had been considerable, and that the debt in question had been included in such settlement and adjustment; that at the time of the payment by the plaintiff the defendant informed the plaintiff that said Gray, Howe & Stebbins had never paid the debt in question, nor made any allowance for the same in said settlement and adjustment; that the plaintiff was ignorant of the payment by Gray, Howe & Stebbins and paid the amount of said debt in reliance upon said representations of the defendant that it remained due and unpaid; that the settlement and adjustment, in which said debt was allowed by said firm to the defendant, were conducted by the defendant on his part through an agent, and that the defendant himself was not present when said settlement and adjustment were made.

The record shows, and the exceptions expressly state, that the case was tried upon the specification. In charging the jury, the Court, after stating the plaintiff's claim as shown by his specification, said: "To entitle the plaintiff to recover, he must prove that the defendant said, in substance, that Gray, Howe & Stebbins were still owing him these items; that the defendant, in fact, guaranteed such an account; that Gray, Howe & Stebbins had so adjusted matters with the defendant that they were not indebted to him on that account, and that the

defendant knew it." To this part of the charge, in so far as it made a finding that the defendant knew of the falsity of his representations essential to recovery by the plaintiff, the plaintiff excepted.

Because of the specification and the course of the trial, and not otherwise, the plaintiff could only recover by satisfying the jury that the representations which the defendant made were fraudulent as well as false. And so the question is, could the representations of the defendant in any view of the case have been fraudulent without actual knowledge on the part of the defendant of their falsity? We think they could. If the defendant had no more than an opinion or understanding that the claim had not been paid, it may well have been fraudulent for him to make an absolute representation that it had not been paid, and demand payment of the plaintiff. There was a view of the case presented by the evidence of the plaintiff, which made it error for the Court to charge that a finding of actual knowledge, on the part of the defendant, of the falsity of his representations, was essential to recovery by the plaintiff: Assuming that the defendant supposed or believed that the debt in question had not been embraced in the adjustment which he had made, through his agent, with Gray, Howe & Stebbins, still, if, as the plaintiff's evidence tended to show, at the time the defendant demanded payment of the plaintiff, the defendant put forth his mere supposition or belief as knowledge, and secured a second payment of the debt through the plaintiff's reliance upon such misstatement, he worked a fraud upon the plaintiff and the plaintiff was entitled to recover under his specification. *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313.

The defendant's evidence tended to show that the indebtedness in question was one with which Gray, Howe & Stebbins had nothing to do, that it was the sole debt of the plaintiff, that the defendant did not make the representations claimed by

the plaintiff, nor any representations whatever in regard to the matter, that in the settlement with the plaintiff all matters in dispute were adjusted by a jump settlement, the defendant throwing off something from his account; and the claim is made in argument that, if there was error in the charge in the respect covered by the plaintiff's exception, there should be no reversal, since it does not appear that the verdict was influenced thereby, but that for anything that appears the verdict for the defendant may have been returned on some ground warranted by the defendant's evidence. But the law is that if it affirmatively appears that there was error in a charge there must be a new trial, unless it also appears that the verdict was not influenced thereby.

Judgment reversed, verdict set aside, and cause remanded for new trial.

D. T. McGOVERN v. HAYS & SMITH, RECEIVERS.

May Term, 1902.

Present: ROWELL, C. J., TYLER, STARR, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed November 18, 1902.

Evidence—Professional opinion—Discrediting witness—Testimony given on former trial—Expert testimony.

In an action for personal injuries, a physician, who attended the plaintiff shortly after his injury, will only be allowed in direct examination to give his present opinion of the plaintiff's condition at the time he so attended him.

Assuming that this witness testified in direct examination that the plaintiff had an adhesion of the pleura to the chest, it was proper

cross-examination to show by him that many persons have such adhesions as marked as the plaintiff's.

The trial court may, in its discretion, allow it to be shown in cross-examination, for the purpose of discrediting the witness, that he has been convicted of an offense not involving moral turpitude.

In a civil action, it is proper to receive in evidence the testimony of a witness given on a former trial as transcribed by the official reporter, when such witness is without the state, though no effort to procure his attendance be shown.

An amateur, little experienced in taking photographs, who disclaims being an expert, may testify as a photographer, if the trial Court finds that he is competent.

In an action for personal injuries received in a collision with a locomotive, it is proper for the engineer to testify, after describing what he did to stop the train, that he did not know of anything more that could have been done to stop it.

CASE for personal injuries. Plea, the general issue. Trial by jury at the September Term, 1901, Washington County, *Munson, J.*, presiding. Verdict and judgment thereon for the plaintiff, and he excepted.

Gordon & Jackson and *F. L. Laird* for the plaintiff.

It was material and admissible to show how severely the plaintiff was injured. Dr. Chandler should have been allowed to give his opinion of the plaintiff's chances of recovery, formed at the time he saw him shortly after the accident. *Railroad Co. v. Cassell*, 66 Md. 419.

The defendants should not have been permitted to show by Dr. Chandler that other people have adhesions of the pleura to the chest, or that such persons are able to do manual work. The evidence was too remote, irrelevant and incompetent.

It was error to allow the plaintiff in cross-examination to be inquired of concerning his conviction of selling liquor. The crime did not involve moral turpitude. *Redway v. Gray*, 31 Vt. 292; *Uteley v. Merrick*, 11 Met. 302; *Brooker v. Coffin*, 5 Johns. 188; *Longhorne v. Com.*, 76 Va. 1016.

The testimony of Dr. Jacobs as given at the previous trial should not have been received. The foundation for its admission was not laid. There was no finding that the defendants had used due diligence in ascertaining his whereabouts, or made any effort to procure his attendance. Jones on Ev. s. 345; *Young v. Sage*, 42 Neb. 37; *Thompson v. State*, 17 So. Rep. 512; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580.

The witness Child was not competent as a photographer. There was not sufficient evidence upon which the Court could adjudge the witness to be competent or to allow the photograph to be admitted as evidence.

The engineer of the locomotive had a right to tell what he actually did do, but the defendants had no right to show that he did not know of anything else to do. *Railroad v. Kirk*, 90 Penn. St. 15; *Guiteman v. Company*, 83 N. Y. 358.

C. W. Witters for the defendants.

HASELTON, J. This was an action on the case to recover for injuries sustained by the plaintiff at a crossing of a railroad managed by the defendants. A trial by jury was had, and a verdict was returned for the plaintiff to recover the sum of \$4,250.00 as damages. Judgment was rendered on the verdict. The case was heard in this court on a bill of exceptions allowed to the plaintiff.

January 27, 1897, the plaintiff was going over the crossing in question, which was in Bolton, when he was run upon by a locomotive and train of cars. The plaintiff's evidence tended to show that his injuries were very severe and that they were solely due to the negligence of the defendants.

The plaintiff improved as a witness Dr. Charles Chandler, who saw the plaintiff two or three times within a week after the time of the accident, and offered to show by this witness that when he so saw the plaintiff it was his opinion as a

physician that the plaintiff had very little chance of recovery, and asked the witness the following question: "From the examination which you made on that first day—all you could see and learn about the man,—what was your opinion as a physician as to the probability of his living, his recovery at all?" The defendants objected, the Court excluded the question, and the plaintiff excepted. In this there was no error. The physician's opinion at the time of the trial was all the opinion evidence which he could properly give on direct examination. In support of his exception the plaintiff cites *Baltimore etc. Co. v. Cassell*, 66 Md. 419, 7 Atl. 805. But that case does not sustain the plaintiff's contention.

The second, third and fourth exceptions were to rulings permitting cross-examination of the same witness as follows: Q.—"Now, doctor, isn't it true that a large number of men have adhesions of the pleura to the lung? What do you say, doctor?" A.—"Yes, there are a large number of people who have adhesion of the pleura to the chest." Q.—"And isn't it true that a large number of men have adhesions as marked as Mr. McGovern's adhesion, who do physical labor to a large extent?" A.—"Yes." Q.—"Is it not true that when they have got such depression—or whatever you call it, as he has got, by reason of adhesion drawing in the chest, that men of his age do a great deal of work—physical work?" The witness was permitted to answer this last question also, but it does not appear what the answer was. There is nothing in the record to show what the doctor's testimony about adhesions, given on direct examination had been, and so there is really nothing upon which to predicate a claim of error in permitting the cross-examination above set out. Assuming, however, that the doctor had testified that the plaintiff had the indicated adhesion, and that the testimony tended to show that it resulted from the injury complained of, the cross-examination above

set out was proper. The second and third questions bore upon the probable impairment of strength and ability to labor resulting from the adhesion, and the first of the three inquiries was fairly preliminary to the others.

The plaintiff was a witness, and for the purpose of discrediting him as such the defendants asked him if he had been convicted of selling intoxicating liquor, and confined in the House of Correction therefor, and elicited affirmative answers. The testimony was received under objection and exception, and the fifth and sixth exceptions relate to its admissibility. The offense of selling intoxicating liquor does not, in legal sense, involve moral turpitude. It ranks, rather, with breaches of the peace by assaults and otherwise. This being so, the plaintiff contends that the evidence was not admissible, and relies upon V. S. 1245, which reads: "No person shall be incompetent as a witness in any court, matter or proceeding, by reason of his conviction of a crime other than perjury, subornation of perjury, or endeavoring to incite or procure another to commit the crime of perjury; but the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness." This statute was enacted to remove a common law disability or incompetency, and at the same time it makes it a matter of legal right to attack the credibility of a witness by showing by independent evidence that he has been convicted of a crime involving moral turpitude. But this statute does not limit the field of cross-examination which, in the sound discretion of the court, counsel may be allowed to go into with a view to shaking the credit of a witness. In *State v. Shaw*, 73 Vt. 149, 50 Atl. 863, the respondent, when on the stand as a witness in his own behalf, was asked if, on a day named, he had not pleaded guilty to an assault, and answered that he had. The evidence was held admissible as tending to affect his credibility. It was held in that case that the mode of

proof was not in question; and the same might be held here if the Court regarded only the line of argument in the plaintiff's brief. But we think that if the trial Court, in its discretion, permits the conviction and imprisonment of a witness for an offense not involving moral turpitude to be gone into, the permission accorded should be exercised by way of cross-examination, and we are not prepared to say that the examiner inquiring about offenses of such grade is not bound by the answers of the witness. In *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603, it was held not error to permit counsel, on cross-examination of a witness for the purpose of discrediting him, to show that he had been convicted of drunkenness and confined in jail. As to the mode of proof the Court says: "While there is some conflict in the authorities and text-books, as well as reported cases, upon this subject, we think the more reasonable and practicable rule is that which does not demand the production of the record when the object, as here, is solely for the purpose of discrediting." In *Clemens v. Conrad*, 19 Mich. 174, the Court, speaking by COOLEY, C. J., says: "We think the reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand, and is questioned concerning it, with a view to sifting his character upon cross-examination." See, also, *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203, and *People v. Cummins*, 47 Mich. 334, 11 N. W. 184. In Wharton's Criminal Evidence, Sec. 474, it is said: "In this country there has been some hesitation in permitting a question, the answer to which not merely imputes disgrace, but touches on matters of record; but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer." In *State v. Elwood*, 17 R. I. 763, 24 Atl. 782, the respondent, who was a witness in his own behalf, was examined as to a former conviction of crime, though the record of

such conviction was not produced, and the examination was held not to be erroneous. We conclude that a witness may be cross-examined as to conviction and imprisonment whenever such conviction and imprisonment are proper to be shown. As has been already intimated herein, it is not a matter of legal right in this State to show, in any way, the conviction of a witness of an offense not involving moral turpitude. The question of the reception of such evidence must be determined by the sound discretion of the trial Court, and we are satisfied that there was no abuse of discretion in permitting the examination complained of.

One Dr. Jacobs had been improved by the defendants as a witness on two previous trials of this case. On this trial the defendants, under objection and exception, were permitted to introduce the testimony of Dr. Jacobs as given at a previous trial. The Court found that the witness Jacobs was without the State, that his absence was of a permanent character, and that his whereabouts at the time of this trial were unknown to the defendants. The plaintiff claims that the admission of this evidence was error, because there was no finding of the Court that the defendants used due diligence, or any diligence, in ascertaining the whereabouts of the witness, or had made any efforts to procure his attendance. No other reason for its exclusion is argued. Under the rule laid down by both Stephen and Greenleaf, no such finding was necessary to make the evidence admissible, the case being a civil one. Stephen's Dig. Ev., (Chase's Ed.) 108; 1 Greenl. Ev., (15th Ed.) 234. The requirement of diligent search recognized by these writers is not applied by them to a case in which the witness is without the jurisdiction, as a careful reading of what they say clearly shows. There is, however, some disagreement among the decided cases, and this disagreement is pointed out in a note in each of the above text-books.

On the findings of the County Court, the evidence of Dr. Jacobs was admissible under the rule applied in numerous cases, among which are the following: *Magill v. Kauffman*, 4 S. & R. 317; *Howard v. Patrick*, 38 Mich. 795; *Omaha v. Jensen*, 35 Neb. 68; *Reynolds v. Powers*, 96 Ky. 481; *Minneapolis v. St. L. Ry. Co.*, 51 Minn. 304; *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752; *Benson v. Shotwell*, 103 Cal. 163; *Atchison T. & S. F. R. Co. v. Osborne*, 67 Pac. 547; *Birmingham Nat. Bank v. Bradley*, 30 So. 546; *Kellogg v. Secord*, 42 Mich. 318; *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *King v. McCarthy*, 54 Minn. 190; *Hill v. Winston*, 73 Minn. 80, 75 N. W. 1030. When a witness is permanently without the State, the only object of requiring diligence in ascertaining his whereabouts would be that his deposition might be taken; but if he has already testified in open court in the identical case in which his testimony is desired, and his testimony has been fully taken by an official stenographer, so that it can be exactly reproduced, his testimony so taken is, at least, as satisfactory as his deposition could be. This view of the matter is fully and satisfactorily discussed in the case of *Emerson v. Burnett*, above cited. It is proper to be observed that, under a rule established by this Court, depositions that have been once used on trial may be thereafter used by either party. In the case of *Magill v. Kauffman*, above cited, it was noted that a statute of Pennsylvania would have permitted the deposition of a witness to be used if it had been used on a former trial of the same case, and though the statute did not extend to the case of a witness who had testified in open court, it was held that a deposition and testimony in open court stood upon the same footing. In one of the cases above referred to the absent witness whose testimony was offered had, as had the witness here, testified on two previous trials of the same case, and it was held

that the fact that his testimony on one of the previous trials was alone offered did not affect its admissibility.

On the findings made by the trial Court the offered testimony of Dr. Jacobs was properly received. How the matter would stand if the case had been a criminal one is excluded from inquiry. It is needless to suggest that were this a criminal case questions would arise which are not here presented, and which would demand careful consideration.

The defendants improved as a witness one A. F. Childs, and his evidence tended to show that soon after the accident he took a kodak view of the crossing in question. Childs testified that he had taken but a few photographs previous to taking the one in question, and that he had not had any experience in the business of photography. He disclaimed being an expert. The plaintiff's evidence tended to show that the photograph in question was inaccurate and could not have been taken at the time claimed. The Court ruled, upon the above evidence, that the witness was competent to testify as a photographer, and thereupon the witness described how and when he took the photograph, and the photograph was admitted in evidence. The plaintiff had an objection and exception to the ruling that the witness was competent to testify as a photographer and to the admission in evidence of the photograph. There was sufficient evidence to warrant the ruling, or, to speak more correctly, the finding that the witness was competent to testify as a photographer. The fact that the witness did not consider himself an expert was by no means conclusive. *Boardman v. Woodman*, 47 N. H. 120. It was immaterial that such knowledge as he had of photography was not acquired in the pursuit of that art as a business. The limited character of his experience went to the weight of his testimony rather than to his competency to testify. It does not appear from the record that the photograph was admitted as independent evidence, and,

therefore, it will be presumed that it was admitted in connection with the testimony of the witness Childs as subsidiary evidence. No error is found in the action of the Court in respect to the testimony of the witness Childs, nor in the reception in evidence of the photograph.

The engineer on the train in question testified in behalf of the defendants as to what he did to stop his train when he saw there was likely to be an accident, and that he did not know of anything more he could have done to stop the train. The plaintiff had an exception to the admission of the latter part of the evidence so given on the ground that the witness should have been confined to what he actually did, and not have been allowed to state matters of speculation. But the witness did not state matters of speculation. It was material to know what the engineer did, and what, if anything, he left undone regarding the stopping of the train. It may be that the witness testified as an expert engineer without an express finding that he was such; but no objection was made on that ground. The objection made is not sustained.

One other exception to the admission of evidence was taken on trial, and appears by the record, but was abandoned in argument. This exception is, therefore, not considered.

Judgment affirmed.

A. P. CARPENTER, ADMR. v. ISRAEL STOWE'S ESTATE.

May Term, 1902.

Present: MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed November 19, 1902.

Administrator—Accounting.

An administrator is chargeable with the full cash price for which property of the estate is sold, though through error a less sum is actually received.

APPEAL FROM PROBATE COURT. Heard on an agreed statement of facts at the March Term, 1902, Windham County, Rowell, J., presiding. Judgment for the defendant estate. The plaintiff excepted.

A. P. Carpenter and *O. E. Butterfield* for the plaintiff.

The plaintiff contends that the estate of Titus Stowe should be charged only with the amount of cash actually received by him, as such administrator, in payment for the real estate sold, and that the administrator *de bonis non* of the estate of Israel Stowe succeeds to all the rights and credits of the estate of his intestate and should collect the \$100 due from W. W. Stowe on the purchase price of the farm. The new administrator should begin business at the point where the former one ceased to act. Administration is continued by the same official—the administrator—but by a different person. *Trumble v. Williams*, 18 Neb. 144; *Payne v. Payne*, 29 Vt. 176.

A contract made with the original administrator, if the damages recovered will be assets of the estate to be administered, is unadministered estate, and the administrator d. b. n. succeeds to the trust and can maintain an action against the purchaser for his default in not completing the contract. *Mc-*

Guinness, Admr. v. Whalen, 17 R. I. 619; *Sullivan v. Holker*, 15 Mass. 374; *Abingdon v. Tyler*, 6 Coldthw. 502; *Skeels v. Peabody*, 6 Black, 120; *King v. Green*, 2 Stuart, 133; *Stair v. Bank*, 55 Pa. St. 364.

A claim which is the subject of pending litigation is unadministered estate. *Hayward v. Place*, 4 Dem. 487; *Hodgens v. Cameron*, 50 Ala. 379; *DeValengin's Admrs. v. Duffy*, 14 Pet. 284.

This account should pass to the administrator d. b. n., and when the decree of distribution is made in Israel Stowe's estate, Frank Worden, as such administrator, should offset the same to the distributive share of Warner W. Stowe. *Ander-son v. Gregg*, 44 Miss. 170; *Tinkham v. Smith*, 56 Vt. 187.

Clarke C. Fitts and Arthur C. Spencer for the defendant.

It was gross incompetency on the part of Titus Stowe to deliver the deed without first counting the money, and he is therefore chargeable out of his own pocket for the deficiency. If an executor or administrator manages the estate in such a manner that assets are lost, or the rights of creditors or distributees are impaired, he is guilty of waste and liable for the loss. *Croswell's Exrs.*, 254; *Spaulding v. Wakefield's Estate*, 53 Vt. 660; *In Re Hall's Estate*, 70 Vt. 458.

The fact that the estate of Israel Stowe is solvent, and that Warner Stowe's distributive share will exceed \$100 has no bearing on the case. It would be a strange rule of law that would determine an administrator's liability for negligence by the question whether the party who profited by it was financially responsible.

HASELTON, J. Carpenter was administrator of the estate of Titus Stowe, and as such administrator presented to the Probate Court the account of Titus Stowe as adminis-

trator of the estate of Israel Stowe. One item in the account charged Titus Stowe, administrator, with \$2,200.00 as cash received on the sale of the home farm of Israel Stowe. The administrator *de bonis non* of Israel Stowe's estate claimed that in the administration account of Titus Stowe the sum of \$2,300.00, instead of \$2,200.00, should be charged on account of the sale of said farm. The case came into County Court on appeal, and was heard by the Court on an agreed statement of facts.

It appeared that under due authority from the Probate Court said Titus, as such administrator, made a cash sale for \$2,300.00 of the farm in question to his brother, Warner Stowe. That Titus delivered the deed of the farm to Warner, and that Warner at the same time handed to Titus a bank book good for \$1,500.00, and a bag which Warner said contained \$800.00 in gold; that Titus took the bag, without counting the gold and without opening the bag, and that he kept it unopened for a day or two, when he took it to a Savings Bank for the purpose of depositing its contents; that the bag was then opened and found to contain only \$700.00; that Titus died shortly afterwards, and that \$2,200.00 instead of \$2,300.00 was all that was ever actually received by Titus for the farm. It did not appear that Titus said anything to Warner about the shortage, but on a book kept by Titus as administrator was found an entry in his own hand-writing charging Warner with \$100.00 "to error in counting gold to pay for farm." It was agreed that the estate of Israel Stowe was solvent, that Warner was an heir, and that his distributive share would exceed \$100.00 above any orders accepted by the administrator. The Court rendered a judgment by which the estate of Titus Stowe was made chargeable in the sum of \$2,300.00 on account of the farm transaction. To this judgment the plaintiff excepted.

We think that the estate of Titus Stowe was properly chargeable with the full cash price for which the farm in question was sold. This cash price must in fairness be considered the proceeds of the sale. See V. S. 2406. It does not, however, follow from this conclusion that the administrator of Titus Stowe's estate cannot collect from Warner the \$100.00, if, in fact, it has not been paid.

Judgment affirmed.

ELLA C. NEEDHAM v. CLARK L. LONG'S ESTATE.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed November 19, 1902.

Insolvency—Contingent claim—Order for dividend.

An order of the Court of Insolvency declaring, in terms, a dividend of a blank per cent to the creditors of an insolvent estate, does not amount to an order of a dividend, final or otherwise.

APPEAL IN INSOLVENCY. Heard on an agreed statement of facts at the March Term, 1902, Rutland County, *Watson*, J., presiding. Judgment, *pro forma*, for the claimant. The assignees excepted.

Edward Dana for the assignees.

The plaintiff's claim was not seasonably presented to the Court of Insolvency. On January 10, 1900, the third meeting of the creditors was held. The estate was finally closed on that day. The dividend was ordered, but the amount was not

computed. The appeal on another claim suspended the figuring of the final dividend, but did not keep the estate open so as to allow any new matters or new claims, contingent or otherwise, to be presented.

Joel C. Baker for the claimant.

V. S. 2074 enables this claimant to present his claim *at any time*. This means at any time before the estate is closed by an allowance of the final dividend thereon. The order of the Court of Insolvency shown by the agreed statement does not amount to this, so the claim was presented seasonably.

HASELTON, J. The sole question in this case is whether a contingent claim of the plaintiff against the insolvent estate of Clark L. Long was seasonably presented to the Court of Insolvency. In determining this question it is not necessary to determine the meaning of the phrase "at any time" as used in V. S. 2074, in relation to the time for filing such claims. The statute makes it clear, and the defendant concedes, that the claim was seasonably presented if it was presented before the order for the final dividend; and it was so presented. Before the presentation of the claim there was an order of the Court of Insolvency declaring, in terms, a dividend of a blank sum on the dollar to the creditors of the estate; but this did not amount to the order of a dividend, final or otherwise. Besides, the order was made at a time when, by reason of litigation over a claim called the "Tower Claim," there could be no order of the final dividend.

The pro forma judgment of the County Court is affirmed, and the cause is remanded that proceedings may be had in accordance with such judgment.

B. A. HUNT v. TOWN OF EDEN.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed December 9, 1902.

*Tax collector—Liability of town for acts of—Tendency of
evidence.*

A tax collector is an officer of the law, and the town electing him is not liable in trespass for his acts, unless made so otherwise than by the relation of the collector, as such, to the town.

Evidence that the selectmen urged the collector to be diligent in collecting the tax of the plaintiff and others, that they referred him to an attorney who was under general retainer from the town, and that such attorney gave him instructions as to the statutory provisions to be followed in collecting taxes and supplied him with forms, does not tend to show that the town so directed and controlled the collector in the acts complained of as to make them the acts of the town.

Whether the selectmen, by any course of conduct in reference to the acts of the collector, could have made the town liable in trespass, is not decided.

TRESPASS AND TROVER. 'Plea, the general issue. Trial by jury at the December Term, 1901, *Start*, J., presiding. Judgment for the defendant on verdict ordered. The plaintiff excepted.

B. A. Hunt pro se.

The town is liable, though the action is trespass. The case tends to show that the town by its duly authorized agents interfered, directed, and assumed control of the collector's actions. It is not a question of whether the evidence is sufficient, but whether the evidence has a legal tendency to prove this claim.

The law abhors circuity of action. Our statute protects the collector by making the town liable to him, and if the tax payer is compelled to sue the collector and the collector sue the town, two suits instead of one are required to assert but one right.

The town cannot be exempted from liability, on the theory of sovereign power, against a non-resident. It should be confined to its own subjects, if allowed at all.

The town must act through its collector. They could not discard him, tax warrant, etc., and proceed in their own name only. They acted, and now are they to be allowed to escape the injurious consequences of *their* premeditated act? 36 Vt. 521.

George M. Powers for the defendant.

In the absence of a statute giving the action, trespass *de bonis* does not lie against a town for the acts of its collector. The collector of taxes, though appointed by the town, gets his authority from, and performs the duties prescribed by, the statute. He is a public and not a corporate officer. The maxim *respondeat superior* does not apply. *Wallace v. Menacha*, 44 Wis. 85.

"Towns are not liable for the conduct of the constables whom they appoint, * * *. They do not act under the authority of the town, but of the law, nor hath the town any control over them, * * *. *Hurlburt v. Litchfield*, 1 Root 520; *Lorillard v. Munroe*, 11 N. Y. 392; *Lahner v. Williams*, 84 N. W. (Io.) 507; *Dunbar v. Boston*, 112 Mass. 75; *Perley v. Georgetown*, 7 Grey. 464; *Alger v. Easton*, 119 Mass. 77; *Bowden v. Rockland*, 51 Atl. (Me.) 815; 2 Dill. Mun. Corp., ss. 761, 770, 772, 777, n.; *Burrows on Tax.*, 441; 2 *Destey on Tax.*, 777; 2 *Addison on Torts*, 1304; *Winn v. Rutland*, 52 Vt. 481; *Welch v. Rutland*, 56 Vt. 228; *Stockwell v. Rutland*, 75 Vt.

HASELTON, J. This was an action to recover damages of the defendant town for the sale of personal property of the plaintiff, by the collector of taxes of the town, in proceedings for the enforcement of taxes assessed against the plaintiff. The only count relied upon was a count in trespass. At the close of the evidence the defendant moved for a verdict. The motion was sustained, a verdict for the defendant was directed and returned, and judgment was rendered on the verdict. The plaintiff excepted.

In the direction of a verdict for the defendant there was no error. Though the collector of taxes is chosen by the town, his duties are those prescribed by statute, and the maxim *respondeat superior* has no application here, unless it is made applicable otherwise than by the relation of the collector, as such, to the town.

The plaintiff, however, contends that there was evidence tending to show that the selectmen and the attorney of the defendant town, in the interest of the town, directed and controlled the collector in respect to the acts constituting the alleged trespass, and so made those acts the acts of the town. The evidence relied on by the plaintiff tended to show that the selectmen requested and urged the collector to be diligent in collecting the tax of the plaintiff and others; that they cautioned him to proceed legally, and referred him to an attorney who was under a general retainer as counsel for the town; and that such attorney gave him instructions as to statutory provisions to be followed in the collection of taxes, and supplied him with forms. This evidence did not have the tendency claimed for it by the plaintiff.

Whether the selectmen, by any course of conduct in respect to the acts of the collector, could have made the town liable in trespass, is a question not decided or considered.

Judgment affirmed.

KATE MOBUS v. TOWN OF WAITSFIELD.

May Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed December 27, 1902.

Injury on highway—Traveler—Proximate cause—Pleading.

To entitle one to an action under V. S. 3490 for injuries received through the insufficiency of a highway bridge which it was the duty of the defendant town to keep in repair, he must have been a traveller upon the bridge at the time of the accident, in the exercise of due care, and the insufficiency of the bridge must have been the proximate cause of his injury.

It cannot be said as matter of law that one who goes upon a highway bridge to assist another who, with his team, has been precipitated by the falling of the bridge to the waterway beneath, and is injured while so engaged, is not a traveller on such bridge at the time of such injury.

If such person, while so assisting, is struck by the struggling horses and injured, the insufficiency of the bridge is the proximate cause of his injury.

The allegation in the declaration that the plaintiff was on the bridge and its fragments assisting her husband, while he was in the situation described, when she was injured, is a sufficient allegation that there was a bridge and that she was then a traveller upon it.

In an action under V. S. 3490, an allegation that the damage occurred "by reason" of the insufficiency of the bridge precludes the idea of negligence on the part of the plaintiff, and is sufficient.

CASE for injuries received through the insufficiency of a highway bridge. The defendant demurred to the declaration at the March Term, 1902, Washington County, *Start, J.*, presiding. Demurrer overruled, *pro forma*, and declaration adjudged sufficient. The defendant excepted.

Frank Plumley and *John W. Gregory* for the defendant.

The plaintiff must be free from contributory negligence, and this must be established as an affirmative fact. *Hyde v.*

Jamaica, 27 Vt. 443; *Barber v. Essex*, 27 Vt. 67; *Walker v. Westfield*, 39 Vt. 246; *Briggs v. Guilford*, 8 Vt. 264; *Carter v. Railroad Co.*, 72 Vt. 190; *Kilpatrick v. Railway Co.*, 72 Vt. 236.

It being an affirmative fact which the plaintiff must establish, it follows that it must in some particular form be alleged in her declaration. *Strong v. Downey*, 62 Vt. 246; *Railroad Co. v. Hiatt*, 17 Ind. 102; 1 Thomp. Neg. s. 370; *Kent v. Lincoln*, 32 Vt. 591; *Brainard v. Van Dyke*, 71 Vt. 359.

The plaintiff must have been a traveler upon the bridge at the time of the injury, and the declaration must so allege. *Baxter v. Turnpike Co.*, 22 Vt. 114; *Hyde v. Jamaica*, *supra*; *Ford v. Braintree*, 64 Vt. 144; *Orcutt v. Bridge Co.*, 53 Me. 500; *Steinson v. Gardner*, 42 Me. 248; *Harwood v. Patham*, 152 Mass. 426; *Blodgett v. Boston*, 8 Allen 237; *Britton v. Cummingham*, 107 Mass. 347; *Stickney v. Salem*, 3 Allen 374; *Richards v. Enfield*, 13 Gray 344; *Hardy v. Keene*, 57 N. H. 370.

One cannot recover for injuries received while knowingly without the traveled part of a road. *Harwood v. Oakham*, 152 Mass. 421; nor can one recover who places himself in a dangerous position in the highway. *Kuhn v. Walker Turnp.*, 97 Mich. 306.

Under the circumstances and conditions set forth in the declaration, the alleged insufficiency of the bridge was not the proximate cause of the plaintiff's injury. *Railroad Co. v. Hiatt*, 17 Ind. 102; *Stickney v. Maidstone*, 30 Vt. 738; *Trow v. Railroad Co.*, 24 Vt. 487; *Railway Co. v. Ives*, 114 U. S. 408.

Dillingham, Huse & Howland and *Zed S. Stanton* for the plaintiff.

The declaration is in common form in like causes and sets forth with sufficient particularity that the plaintiff was injured "by reason of" the insufficiency of the bridge. The addition of the adverb *solely* would have neither enlarged nor more distinctly defined the causes of her injuries.

It is not necessary to allege in express terms that the plaintiff was not guilty of contributory negligence. 5 Ency. Pl. & Pr. 1; *Coal Co. v. Chambliss*, 97 Ala. 171; *Railway Co. v. Bradford*, 86 Ala. 574; *Magee v. Railroad Co.*, 78 Cal. 431; *Railroad v. Evans*, 87 Ga. 673; *Lester v. Pittsford*, 7 Vt. 158; Heard's Stephen on Pl. 350; *Johnson v. Railroad Co.*, 5 Duer 21; Pierce on Railroads, 322.

The insufficiency of the bridge and its resultant effect was the proximate cause of the plaintiff's injury. *Stickney v. Maidstone*, 30 Vt. 738; *Company v. Langendorf*, 44 Ohio St. 316; *Steel Co. v. Marney*, 88 Ind. 482.

7. TYLER, J. The declaration alleges, in substance, that while the plaintiff's husband and son were passing over a highway bridge in defendant town, upon a loaded cart drawn by two horses, by reason of the insufficiency and want of repair of the bridge—which it was the defendant's duty to maintain—it broke, and the horses, the loaded cart and the plaintiff's husband and son were precipitated to and among the broken fragments of the bridge to the water-way beneath the bridge; and that her husband was there fastened beneath the fragments of the bridge, the horses, cart and load, and unable to extricate himself; that he was greatly injured, and was in danger of further injury; that while he was so situated the plaintiff went to his assistance; and that while she was upon the bridge and its fragments, extricating her husband, she was kicked and injured by the horses, as they floundered in the water-way and upon her husband, and that she was also injured by the falling fragments of the bridge and cart.

The defendant demurred to the declaration, and assigned several causes of demurrer which will be considered. The Court below, *pro forma*, overruled the demurrer, and held the declaration sufficient, to which the defendant excepted.

The plaintiff's right to recover rests upon no common law liability on the part of the town, for towns are created for governmental purposes, and private actions do not lie against them, at common law, for neglect of duty, though an individual suffers damages by reason of such neglect. If the plaintiff is entitled to recover, it is by reason of the liability imposed upon the defendant by V. S. 3490, which must be strictly construed. Its provisions are the limits of the defendant's liability. The plaintiff must have been a traveler upon the bridge when she received her injury, and the insufficiency of the bridge must have been the proximate cause of the accident, no want of ordinary care on the part of the plaintiff contributing thereto. This is the doctrine of *Baxter v. Winooski Turnp. Co.*, 22 Vt. 114, 52 Am. Rep. 84, and of many subsequent cases.

Was the plaintiff a traveler?

The language of the statute is: "If damage occurs to a person or his property by reason of the insufficiency or want of repair of any bridge or culvert which the town is liable to keep in repair, the person sustaining damage may recover the same in an action on the case; * * * ." The necessary implication is that highways are for the purpose of travel and that the right of the public is the right of transition over them from place to place. This is the construction given the statute in *Baxter v. Winooski Turnp. Co.*, *supra*, and in *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 595. In the statutes of other States this is so expressed.

The injury must be to the person or property of a traveler. *Stickney v. Maidstone*, 30 Vt. 738. This does not mean that

a person must be in actual motion at the time of the occurrence of the accident. As illustrated by DOE, C. J., in *Varney v. Manchester*, 58 N. H. 430, 40 Am. Rep. 592, a man might be on his way for a physician, but meeting him, and while stopping and conversing with him receive an injury through the insufficiency of a highway; the town might be liable to him as a traveller.

Britton v. Cummington, 107 Mass. 347, was where a carriage occupied by several persons and drawn by two horses was passing along a highway, but was stopped by the driver to enable him to pick berries by the wayside, when one of the horses threw his checkrein over a blinder of the other horse's bridle, and when the driver attempted to unhitch it, one horse and then the other backed and the carriage was suddenly thrown down an embankment; held, that the question whether the plaintiff had ceased to be a traveler at the time of the accident was for the jury.

There are numerous decisions in the books upon the question whether, in the circumstances of given cases, persons were travelers or not; but they all come to this: If the purpose for which a person is upon a highway is for transit from one place to another, he is a traveler, and not otherwise. In Massachusetts, under a statute similar to ours, it has been repeatedly held that where a person is using a highway simply for the purpose of play, and receives a personal injury by reason of a defect therein, he cannot maintain an action to recover damages. Accordingly it was held in *Tighe v. Lowell*, 119 Mass. 472, that where a child went upon a highway merely to play and there received an injury by means of a defect therein, there could be no recovery as the child was not a traveler. And in *Lyons v. Brookline*, 119 Mass. 491, a child was permitted to go upon the highway to walk, but sat down upon a sidewalk where other children were playing, and was injured by the

falling of a stone not properly secured; it was held that she was not a traveler.

In *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23, the plaintiff was injured by the insufficiency of a highway while racing his horse upon it; held, that he was not a traveler within the meaning of this statute; and in *Hardy v. Keene*, 52 N. H. 370, that the terms "travel," "traveler" and "traveling" have no technical meaning; that the whole matter is within the exclusive province of the jury under such instructions of the Court as the circumstances of the case require.

Bliss, Admr. v. South Hadley, 145 Mass. 91, 13 N. E. 352, was where a child about two years old, in charge of an older child, ran across the street and fell into a gutter at the side of the street, the older child meanwhile watching other boys at play; held, that it was competent for the jury to find that the children were travelers on the highway. See *Gulline v. Lowell*, 144 Mass. 491, 11 N. E. 723.

In *Hunt v. Salem*, 121 Mass. 294, a boy, on his way home, crossed the street to look at toys in a shop window, and stood looking at them four or five minutes, and was injured by catching his foot in a grating as he turned away to resume his walk; held, that he could recover.

In *Graham v. Boston*, 156 Mass. 75, 30 N. E. 170, four minors were going home, playing tag as they went. They stopped, and then one went ahead of the rest and came in contact with a live wire, and received injuries, and when the others went to his assistance they were injured; held, that all could recover.

DEVENS, J., stated the rule in *Harwood v. Oakham*, 152 Mass. 421: "We have assumed that the word 'traveller,' which is found in the statute, is not there used in any narrow or restricted sense, and that the highway is to be kept safe and con-

venient for all persons having occasion to pass over while engaged in any of the pursuits or duties of life."

In the present case the plaintiff went upon the bridge for a legitimate purpose, and, though she stopped to assist her husband, it cannot be held as a matter of law that she was not a traveler upon the bridge.

But the defendant contends that the plaintiff was not a traveler upon the bridge, for the reason that it was broken down at the time of the injury to herself, and had ceased to constitute a part of the highway, so that the case falls within another line of decisions where damages are denied for injuries received outside the limits of the highway.

In *Hyde v. Jamaica*, 27 Vt. 443, the plaintiff's intestate was drowned in attempting to drive through a fordway in a river, which had not been adopted by the town, though the bridge had been swept away; held, that there could be no recovery, the accident having happened outside of the highway limits.

A traveler upon a highway, who stops and ties his horse outside of the highway limits, using due care, cannot, if the horse gets loose and runs upon the highway, and suffers an injury from a defect therein, maintain an action against the town for such injury. *Richards v. Enfield*, 13 Gray, 344; *Commonwealth v. Wilmington*, 105 Mass. 599.

A town is not liable for personal injuries sustained by a traveler on a highway in falling from a bridge thereon, if, being acquainted with the bridge, he knowingly passes outside a rail which marked the limits of the way prepared for travel, to assist his servant who has there fallen into the stream. *Harwood v. Oakham*, *supra*. The last case is like *Sykes v. Pawlet*, where a person having voluntarily and for his own convenience deviated from the highway which was in good condition, met with an accident causing damage to him by

backing his horse over a bank outside of the highway, but which extended up to the traveled track so as to make the highway itself insufficient and dangerous outside of the traveled track; it was held that the town was not liable for damages. *Drew v. Sutton*, 55 Vt. 586.

The defendant also relies upon *Kelley v. Boston*, a recent case reported in 62 N. E. R. 259. There the plaintiff saw her child, who was about four years old, in the water of a sewer, where he had fallen through an open catch-basin which it was the duty of the city to keep covered. The plaintiff descended into the basin and rescued the child, but in so doing contracted a cold which resulted in rheumatic fever. The Court said: "Laudable as was her motive, she ceased to be a traveler, and put herself in another relation to the defendant, in reference to which the law imposes no liability upon cities and towns." The Court also held that the plaintiff voluntarily gave up her position as a traveler when she abandoned the use of the street for travel, and passed from the surface of it, which alone was fitted and intended for travel and descended into the catch-basin. In this case the catch-basin clearly was not a part of the street, though situated within it.

The declaration, in the case at bar, does not in terms allege that the plaintiff was a traveler upon the bridge, but it does allege that she went to her husband's assistance while he was in the situation described in the declaration, and that while she was on the bridge and its fragments, extricating him, she was injured. These are sufficient allegations that there was a bridge, whatever its condition, at the place of the accident, and that the plaintiff was a traveler upon it. *Lynds v. Plymouth*, 73 Vt. 216.

Does this case come within the statute, or was the plaintiff's injury the result of a new cause intervening after the accident to her husband had occurred?

The defendant contends that the kicks of the horses and the falling fragments of the bridge after the accident had happened, were the direct, and that the insufficiency of the bridge was the remote cause.

In *Stickney v. Maidstone*, *supra*, the bridge broke and let the hind legs of the traveler's horse through it so that the horse could not extricate himself. The plaintiff sent his wife, who was with him, to a house near by for assistance, and a man went to the bridge and aided the plaintiff in getting the horse out of the hole, but in so doing the plaintiff was struck by the struggling horse and injured. It was contended by the defendant that the insufficiency of the bridge was only the remote cause of the plaintiff's injury and that the struggles of the horse were the immediate cause; also that the plaintiff was under no legal obligation to attempt to save the horse, and that having volunteered the attempt he should take the risk of any injury resulting therefrom. PIERPOINT, J., said in delivering the opinion of the Court: "This argument would have equal force if the plaintiff himself had been thrown through the bridge, and left in the same position, without injury in the first instance, but in freeing himself from the dilemma, had broken his arm, or his leg; yet in such case the defendant would hardly claim that, inasmuch as he was under no legal obligation to get out, and might remain there, his attempt to extricate himself was voluntary, and therefore he must take the risk of all reasonable, judicious and prudent efforts for that purpose.

"We think that the rule claimed by the defendant is quite too narrow to be sustained upon sound principle or authority. It was clearly the *duty* of the plaintiff, both morally and legally, to use all reasonable and proper means to save the horse. It

was his duty to the town so to do, and if he had neglected to make the effort, the town would have had reason to complain. But whatever may have been his duty under the circumstances, he clearly had the right to make all such proper and judicious efforts as were required to immediately relieve himself and his property from the position into which he had been thrown by reason of the defect in the bridge, and while doing so he must be regarded as acting under the direct and immediate force of the first cause, which made such efforts necessary, and until that end is accomplished, the town must be responsible for such injuries as ensue."

In discussing the question of proximate cause, the court said: "The extent to which the first and proximate cause shall be said to operate, so as to procure direct and immediate results, must depend upon the peculiar circumstances of each particular case. It would be extremely difficult to lay down any rule defining the precise line that divides the proximate from the remote cause, which would operate justly in all cases. But we think it clearly safe to say, that, in a case like the present, the first cause does not cease to be the direct and proximate cause, until the party shall have released himself or his property from the imminent and immediate peril directly occasioned by such cause."

If, in that case, the plaintiff's wife, instead of going for assistance, had remained and assisted her husband in extricating the horse, and had herself been injured, clearly she would have had the same right to recover damages that her husband had. If she could have recovered, the plaintiff in this case can recover. The insufficiency of the bridge was the direct and operating cause of the disaster, including the injury to the plaintiff wife. If a traveler were thrown from a bridge by reason of its insufficiency and injured by striking upon rocks

below, it could not be said that the rocks, and not the insufficiency of the bridge, were the proximate cause of the injury.

It is not that a new duty from the defendant to the plaintiff arose when the plaintiff went to her husband's rescue. She went upon the bridge after it had fallen, in the exercise of a right and in the performance of a duty to her husband, and was as much a traveler upon it as she would have been had she been attempting to cross it on her way for a doctor or for other assistance for her husband. But her injury was an incident to the disaster to her husband, of which the insufficiency of the bridge was the direct operating cause.

A large part of the defendant's brief and argument are directed to the subject of negligence, and to the fact that the declaration contains no allegation that the plaintiff was free from contributory negligence.

It is the rule in this State, that in actions to recover damages occasioned by the defendant's negligence, the burden is upon the plaintiff to show that such negligence was the sole, operating cause of the injury—that no want of due care on the part of the plaintiff helped to produce it. This is clearly stated in *Bovee v. Danville*, 53 Vt. 183. But it is not necessary that this should be alleged in the declaration. It is enough if the declaration states that the insufficiency of the bridge was the sole cause of the accident. Where it alleges that the damage occurred "by reason" of such insufficiency it complies with V. S. 3490, and the idea of the plaintiff's negligence is precluded. Upon the facts alleged, in the situation of danger in which the plaintiff saw her husband, it cannot be held as matter of law that the plaintiff was not in the exercise of the degree of care that a careful and prudent person would exercise in like circumstances.

Demurrer overruled and declaration held sufficient.

ROWELL, C. J., and WATSON, J., dissent.

JOSEPH HEATH and C. W. HEATH vs. LATON M. ROBINSON.

October Term, 1902.

Present: ROWELL, C. J., TYLER, START, WATSON, STAFFORD and
HASLTON, JJ.

Opinion filed January 31, 1903.

*Justice of the Peace—Jurisdiction—Title to land—New counts
—Appellate Jurisdiction.*

The jurisdiction of a justice of the peace, so far as it is determined by the question whether the title to land is concerned, depends upon the declaration and not upon the plea or the course of the trial.

When, in an action of trespass appealed from the judgment of a justice of the peace, the plaintiff files an amended declaration raising the *ad damnum* from \$20.00 to \$100.00, the County Court is ousted of its appellate jurisdiction, if the title to land is concerned.

In an action of trespass for cutting down the plaintiff's growing trees, the title to land is necessarily involved.

TRESPASS QUARE CLAUSUM, trespass *de bonis*, and trover, with *ad damnum* in each count \$20.00, appealed from the judgment of a justice of the peace. At the March term, 1902, Orleans County, Munson, J., presiding, the defendant's demurrer for misjoinder of counts was sustained. Thereupon, by leave of Court, the plaintiff filed a new declaration in trespass and trover with *ad damnum* in each count \$100.00, which the defendant moved to dismiss. Motion overruled and the defendant excepted.

F. W. Baldwin for the defendant.

Of the original declaration the only count that could have been sustained was the one of trespass *quare clausum*, and then only to recover \$20.00. V. S. 1040. The other two counts

would have brought in question the title to land, hence the justice could not have had jurisdiction.

When the case came into County Court on appeal, that Court had no jurisdiction beyond that of the justice; and to allow the plaintiff to amend himself into jurisdiction, was clearly error. *Prindle v. Cogswell*, 9 Vt. 183; *Whitney v. Sears*, 16 Vt. 587; *Sanders v. Pierce*, 68 Vt. 468; *French v. Holt*, 57 Vt. 187.

Aldrich & Reirdon for the plaintiffs.

No new cause of action was brought into the case by the amended declaration. The count in trespass was waived and the plaintiffs elected to retain the other counts. The count in trespass and the *ad damnum* of over \$20.00 were never, both at once, in the case. Under the original declaration the case was within the jurisdiction of the justice and appealable; the amended declaration has not changed it in this respect. There is, therefore, no question of jurisdiction properly in the case.

This amendment would have been proper in the justice court. V. S. 1148. All amendments are in the discretion of the Court. *Chaffee v. Railroad Co.*, 71 Vt. 384.

The allowance of the amendment being a matter of discretion will not be reviewed here. *Carpenter v. Gookin*, 2 Vt. 495.

STAFFORD, J. In Vermont, justices of the peace may hear and determine actions of trespass upon the freehold, although the title to land is involved, if the *ad damnum* does not exceed twenty dollars; but they have no jurisdiction of other forms of action, if the title to land is concerned, no matter how small the sum demanded may be. In trespass *de bonis*, trover, and most other actions, they have jurisdiction to the amount of two hundred dollars. V. S. 1040. Whether

the title to land is concerned depends upon the declaration,—that is, whether to prove its allegations will require the plaintiff to prove title to land,—and does not depend upon the plea, nor the course of trial. So, in trespass *de bonis* for taking and carrying away grass not alleged to be growing when taken, the justice had jurisdiction, although the plea and the evidence brought in issue the title to the land upon which the grass had been cut. *Jakeway v. Barrett*, 38 Vt. 316. But actions for breach of covenant in a conveyance of land, (*Hastings v. Webber*, 2 Vt. 407), case for erecting a fence so near the plaintiff's house as to obstruct his windows, (*Whitney v. Bowen*, 11 Vt. 250), case for obstructing a stream and causing it to overflow the plaintiff's land, (*Haven v. Needham*, 20 Vt. 183), case for leaving open a pent-road gate, thereby letting in cattle that destroyed the plaintiff's crops, (*French v. Holt*, 57 Vt. 187), and such like, do put the plaintiff to proof of title to make good his declaration, and are therefore outside a justice's jurisdiction.

When the present action was commenced before the justice, the declaration contained three counts,—one, trover; one, trespass *de bonis*; and one, trespass on the freehold. The first and second were for converting and carrying away wood and timber, and the third was for breaking and entering the plaintiffs' close and there felling and destroying trees. The *ad damnum* was twenty dollars. The plaintiffs had judgment, and the defendant appealed to the County Court, where he demurred for misjoinder of counts, and his demurrer was sustained. Thereupon the plaintiffs, having obtained leave, filed an amended declaration, which is treated by both parties as standing in lieu of the first, and being the only declaration now in the case; and this declaration the defendant moved to dismiss, as showing that the Court had no jurisdiction. His

motion was overruled, and it is the exception to that ruling which is now before us.

The new declaration contains two counts: The first declares in trespass for cutting down and destroying trees of the plaintiffs growing upon land which is not otherwise alleged to be the land or close of the plaintiffs, "to the damage of the plaintiffs one hundred dollars." The second declares in trover for the conversion of wood and timber, "the product of the same trees in the preceding count mentioned," "to the damage of the plaintiffs one hundred dollars, for the recovery of which with just costs this suit is brought." By the amendment, therefore, the *ad damnum*, which is, indeed a part of the declaration, (*Chadwick v. Batchelder*, 46 Vt. at p. 727), was raised from twenty to one hundred dollars,—an amendment which, had it been made before the justice, would have ousted that court of its jurisdiction, if the title to land is concerned, and must consequently oust the County Court of its appellate jurisdiction upon the same condition.

So the question is, whether to prove their new declaration the plaintiffs must show title to land. It seems pretty clear that they must. They declare for cutting down their growing trees. How can they prove that the trees belonged to them without thereby proving that they had title to land, since such are in law a part of the land upon which they are growing? We think the first count must be regarded as an inartificial count in trespass on the freehold, for the allegation shows that the trespass was a trespass upon the plaintiffs' land, and the injury an injury to their real estate. It is as if the defendant had been charged with digging up and carrying off a load of soil from the plaintiffs' garden, or with lifting their house from its foundations and moving it away. Hence we

conclude that in refusing to dismiss the amended declaration the County Court erred.

Judgment reversed and cause remanded.

IN RE SYLINDIA B. HATHAWAY'S WILL.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON and
STAFFORD, JJ.

Opinion filed January 31, 1903.

*Wills—Parties to contest—Witness—Competency—Evidence
—Instructions.*

A person named as executor in a will who never qualified as such or received letters testamentary, and who was not named in the order of the Probate Court as the person upon whom notice of the appeal from the allowance of the will should be served, is not a party to the proceedings upon such appeal, and his wife is a competent witness.

When a husband and wife are properly joined as parties to a contest over the establishment of a will, the wife is a competent witness.

When the state of certain evidence is such that no material fact can be found upon it, it is not error to withdraw it from the consideration of the jury.

When the testimony tends to show that certain words in a will were written with a different pen and different ink, but the jury find specially that they were written into the instrument before it was executed, it is not error that the Court refused to charge that the time when these words were written should be considered upon the question of due execution.

A request to charge, which, though it contains a correct statement of the principle contained therein, is not applicable to the case on trial on account of the state of the evidence, is properly refused.

It was for the jury to say what a certain statement, made by a witness out of court, indicates.

APPEAL from a decree of the Probate Court allowing an instrument as the will of Sylindia B. Hathaway. Trial by jury at the June Term, 1902, Windsor County, *Haselton*, J., presiding. Verdict and judgment thereon sustaining the will. The defendants excepted.

Charles Batchelder for the contestants.

The trial Court erred in admitting the wife of the person named as executor in the proposed will as a witness in support thereof. *Crocker v. Chase's Estate*, 57 Vt. 413.

It may be claimed that a person merely named as executor and not duly appointed is not entitled to act as proponent. He seems to be regarded as liable for costs. *Wyman v. Symms*, 10 Allen 153. He has been regarded in certain instances as a proper party. *Colvin v. Fraser*, 2 Hagg, 368.

In case it should be claimed that any notice given in the case is decisive of the question who is the proposing party, we submit that if this is true then it is in order for a probate judge to make and unmake parties to causes arising from matters in Probate Court. V. S. 2592. Until the person named as executor by a formal written notice declines to accept the trust he must be considered the party.

If Charles H. English is in law the proposing party, then his wife is not a competent witness. *Davis v. Davis's Estate*, 48 Vt. 502; *Crocker v. Chase's Estate*, *supra*.

Mrs. Howland was not a competent witness in favor of the will since she was not properly joined as a party in a *suit*. The proceeding to establish a will is not a suit. Mr. Howland is interested. *Eliot v. Eliot*, 10 Allen, 357; *Labarce v. Wood*, 54 Vt. 452. Mr. Howland being interested, his wife

is incompetent as a witness. *Wescott v. Wescott's Estate*, 69 Vt. 234; *Giddings v. Turgeon*, 58 Vt. 106.

It was error to instruct the jury to disregard the testimony of Gilbert Atwood. It was received without objection, and counsel for the proponents cross-examined the witness. *Thomp. Trials*, ss. 716-719.

As to the words claimed to have been inserted after the execution of the instrument, whatever the finding, the Court should have complied with the request to charge, and a refusal to do so was error. The burden was upon the person proposing the will to explain the matter. It was claimed that the instrument had been altered. The burden was on the proposing party to clear away that cloud. *I Greenl. Ev.* (16 Ed.) s. 564.

There was error in failing to instruct the jury that the testatrix should not only have in mind the value and extent of her property, but should also have in mind her relatives and their needs and natural claims upon her. *Converse v. Converse*, 21 Vt. 168.

Evidence was introduced tending to show that English, when asked in relation to the disposition the testatrix had made of her property, told that which was not true. This being so, the contestants were entitled to have the jury instructed in accordance with the second request. *Fairchild v. Bascom*, 35 Vt. 398, 418.

William E. Johnson for the proponents.

Mr. English was not a party to the suit. He did not accept the trust, he did not give a bond, and was forbidden by law to intermeddle with the estate. V. S. 2377. The Probate Court directs in the matter of the notice of appeal. V. S. 2592.

The appellant is required to file in the County Court a certified copy of the record with evidence that notice has been given to the *adverse party* according to the order of the Probate Court. V. S. 2594.

The contestants rely upon the case of *Crocker v. Chase's Estate*, 57 Vt. 413, but examination of the certified copy of the files in that case shows that the Probate Court ordered service made on Crocker, the executor, and no one else, and that service was so made. Under those circumstances the decision was correct, but the case is no authority here. Here the Probate Court ordered service to be made upon the legatees, and the legatees are therefore the proponents.

It is held in *Richardson v. Richardson*, 35 Vt. 238, that the executor of a will who takes no benefit under it, is a competent witness to its execution. In this case Mr. English takes no benefit. It follows then, he would have been a competent witness to the will and consequently his wife was a competent witness to the will.

Elvira T. Howland was competent because she was properly joined with her husband as a party to the suit. V. S. 1241. Besides Mrs. Howland was interested personally in the result of the case, and she was a witness, not for her husband to aid him, but for herself and to protect her own rights and interests. The fact that her testimony might incidentally benefit her husband does not preclude her from testifying in her own behalf.

There was no error in withdrawing the testimony of Gilbert Atwood from the consideration of the jury. His testimony tended only to show the simple fact that the testatrix, eight years before she made this will, sold her farm to Mr. English on time for a less sum (but how much less does not appear) than she had been offered for it in cash. This fact,

standing alone, has no tendency to show that eight years afterward Mr. English by undue influence procured the testatrix to make this will. *Foster's Executors v. Dickinson*, 64 Vt. 239; *Thomp. Trials*, s. 2354.

The request of the contestants in reference to the testimony of George Raymond was properly refused. The most that could be claimed for this testimony would be that it tended to impeach the testimony of Mr. English. The Court so treated it in the charge.

The request in regard to the words claimed to have been written into the will after its execution was properly refused. At most it would be an alteration by a stranger after the execution. In this case the adding of the words does not alter the terms of the instrument, and is at most an immaterial alteration. *Derby v. Thrall*, 44 Vt. 415.

The jury having found that these words were in the instrument when executed, removes all question under this exception.

The contestants' request relative to the claims of kinship, though sound in law, was not applicable to the circumstances of this case, and therefore was properly refused.

STAFFORD, J. The will in dispute was established in the County Court, and the questions before us arise upon exceptions taken by the contestants to rulings and instructions during the trial.

The first question is whether the wife of the person named in the will as executor was properly permitted to testify. Charles H. English, the person so named, drew the will and had the custody of it until after the death of the testatrix, when, as the statute required, he left it with the Probate Court and thereafter had nothing to do with it or with the estate. He never accepted or declined the trust, nor ever gave

a bond, nor ever received letters testamentary. A penalty is provided for failing to return a will left in one's custody, and for failing, if named therein as executor, to signify in writing acceptance or refusal of the trust. V. S. 2357-2359. One neglecting to accept or to give bonds for twenty days after probate is forbidden to intermeddle or act as executor. V. S. 2377.

In the Probate Court the instrument had been allowed. The only legatees are Benjamin E., Elvira T., and Josephine Howland. The heirs at law are four, of whom two appealed. In such cases the statute requires the appellant to "give notice of his appeal in such manner as the Probate Court directs." V. S. 2592. And to file in the County Court, with the certified copy of the record in the Probate Court, "evidence that notice has been given to the adverse party according to the order." V. S. 2594. Here the Probate Court directed that notice of the appeal should be given by service upon the legatees, which was done. The legatees entered and have alone acted as proponents; while the appellants have appeared and acted as contestants.

Was Mr. English, under these circumstances, the proponent of the will, and a party to the proceeding? If he was, his wife was incompetent as a witness. *Crocker v. Chase's Estate*, 57 Vt. 413. In that case the Probate Court directed that notice of the appeal should be given to the person named as executor in the will, who was accordingly served, and entered and acted in the County Court as proponent. The legatees were not notified, and did not appear as parties. Consequently the executor there stood as proponent, representing the legatees and being the party of record. Here, as we hold, the legatees, and not Mr. English, were the parties of record, proponents of the will; and so, of course, there was no error in permitting Mrs. English to testify.

The next question is whether Mrs. Howland was properly admitted as a witness. She is one of the legatees, and is the wife of another legatee. The objection urged is that, her husband being interested, she is incompetent under the common law rule; and so she is, unless she is included in the statutory exception which permits husband and wife to testify "when they are properly joined in the action as plaintiffs or defendants." V. S. 1241. It is argued that this proceeding is not an action, within the meaning of the statute; but we think the word was intended to include it, and is broad enough for the purpose. In the case of *In Re Nelson's Will*, 70 Vt. 130, 39 Atl. 750, the husband of an heir joined with his wife in an appeal from the allowance, and motion was made to dismiss him as improperly joined; but, it appearing that the decedent left real estate which would come to the appellant wife if the will should be disallowed, he was held to have such a legal interest in the controversy, by virtue of his marital rights in the real estate, as entitled him to join in the appeal. So here Mrs. Howland was properly joined by virtue of her own interest, and cannot be denied the privilege of testifying for herself, although she thereby testifies for her husband, also, who happens to have a similar interest,—that being the very reason, as we conceive, for the enabling clause above quoted.

One ground of objection to the will was that it was the product of undue influence on the part of Mr. English. In support of this claim the contestants showed by Mr. Atwood that about ten years before the will was made he offered the testatrix a sum in cash for certain of her land, which she refused. They then offered to show that a short time afterwards she sold the land, with some personal property, to Mr. English, on time, for a less sum, but not how much less. The offer was excluded and the contestants excepted, but do not rely

upon that exception here. The jury was finally told to leave the Atwood testimony out of consideration, and to this an exception was taken which is still urged. But the state of the evidence was such that the jury could not have found any material fact upon that detached statement, and there was no error in withdrawing it.

The instrument in question contained the following clause: "It is my will that all the residue of my estate of every kind and description, after paying all the cost of settlement, be turned over to Benjamin E. Howland, Alvira T. Howland and Josephine Howland in equal shares; that is, one-third to each,—theirs to do with as they please."

The words, "theirs to do with as they please," the contestants claimed, and introduced evidence to show, were written with a different pen and with different ink from those used in drawing the remainder of the will. It was conceded that these words, as well as the rest of the instrument, were written by Mr. English, who testified that they were written before the will was executed. The jury, in a special verdict, found that his statement in this respect was true; and, in view of that finding, we see no merit in the contestants' exception to the refusal of the Court to charge that the time when these words were written should be considered in determining whether the will was duly executed.

Exception was taken to the refusal of the Court to charge as follows: "The natural claims of kinship are usually recognized by one in meting out her bounty, especially if her kindred be poor, and her relations with them have been friendly. If such natural claimants are ignored, it is a circumstance which bears strongly upon the issue of undue influence, as well as mental capacity."

Without criticizing the request as a general proposition, it is enough to say that it had no such application to the case

on trial as to entitle the contestants to have it given. There was no evidence that the kin were poor, and the undisputed testimony showed such neglect of the testatrix on their part, and such kind and constant attention on the part of the legatees, that a charge in the language of the request would have been much less appropriate than the one given, which we think omitted none of the legal elements.

The Court was asked to instruct the jury that if Mr. English did tell George Raymond, as the latter had testified, that he did not know that the testatrix had made a will, it would tend to show that he was trying to shield both himself and the legatees from suspicion of having unduly influenced the testatrix, because he would not have said so if there had been nothing to conceal. The request was properly refused. Mr. English was not a party, but a witness, merely; and in any view it would be for the jury to say, as matter of fact, whether the statement indicated what the contestants claimed, or only that Mr. English had forgotten, or was reticent about disclosing a confidential matter, and not for the Court to say what it indicated, as matter of law.

Judgment affirmed and ordered certified to Probate Court.

IN RE SABINA KNAPEN'S WILL.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, STAFFORD and
HASELTON, JJ.

Opinion filed January 31, 1903.

Wills—Alterations—Revocation.

Alterations made by a testator in a duly executed will, which leave the original provisions decipherable and which are not made with the formalities required to make them effectual, do not revoke the instrument in whole or in part, unless the intention so to do is made out, and the will must be established as originally executed.

APPEAL from a decree of the Probate Court establishing an instrument as the will of Sabina Knapen. Heard on an agreed statement of facts, at the March Term, 1902, Rutland County, *Watson, J.*, presiding. Judgment disallowing the will. The proponent excepted.

Lawrence & Lawrence for the proponent.

It appears that the testatrix attempted to make certain changes in her will without observing the required formalities. An interlineation is not a cancellation or an obliteration; nor do erasures in wills amount to cancellation, obliteration or revocation. These are at most but attempts to change the will. They do not disclose a purpose to revoke the will, but clearly indicate the purpose and desire that the instrument remain in force.

The original terms of the instrument being legible, the instrument must be sustained as originally drawn. *Schouler on Wills*, ss. 431-432; *Pennimon's Will*, 20 Minn. 245; *Dickson's Appeal*, 55 Pa. 424; *Jackson v. Holloway*, 7 Johns. 394; *Doane v. Hadlock*, 42 Me. 72.

The case of *Warner v. Warner*, 37 Vt. 367, is not in point, since in that case the purpose of the testator to cancel the whole will is actually expressed.

Joel C. Baker for the contestants.

At various times during the life of Mrs. Knapen, she made erasures upon her will, wrote other bequests in it and changed it in many respects, and materially changed many of the specific requests. It was the manifest purpose and intent of the testatrix that her will should not stand and remain as she had executed it. There was such a marking with intent to revoke that it may be said that the instrument no longer exists as it was. *Warner v. Warner*, 37 Vt. 367; *Evan's Appeal*, 58 Pa. St. 238.

While it may be possible to cancel certain clauses and bequests in a will without revoking the whole will, it will not be allowed where the clauses cancelled change the other clauses or render them unintelligible, or where it is manifestly the intention of the testatrix not to allow the original clauses to stand except in connection with the clauses cancelled, or the new parts inserted by interlineation. Page Wills, s. 254; *Olmstead's Estate*, 122 Cal. 224; *Damman v. Damman*, 28 Atl. 408.

STAFFORD, J. The testatrix made and executed her will in due form of law, and the same is still decipherable. But afterwards she attempted to make various changes therein without complying or attempting to comply with the requirements of the statute; and the question is three-fold,—whether the will is to be established as it was when it was executed, disregarding the attempted changes; or to be disallowed as having been wholly revoked thereby; or to be established as orig-

inally executed, except as to certain clauses, and as to those to be treated as revoked by cancellation.

The will, as executed, made some special bequests, and several money bequests, and then added a residuary clause in favor of the testatrix' two sisters, Susan Tupper and Margaret Vaux. In this clause a pen and ink line has been drawn through the name "Margaret Vaux." In the margin opposite has been written in ink the word "deceased;" and at the end of the clause have been added, also in ink, the words, "Share with Mrs. Ada Stabb." The original will was type-written, and all the attempted changes made with a pen are, it is agreed, in the handwriting of the testatrix.

In one of the early clauses there was a bequest to the same Margaret Vaux of five hundred dollars. Here the name "Margaret" has been drawn through with a line in ink, and the word "deceased" written in the margin opposite; and to the clause have been added the words, "to be given to Mrs. Ada Vaux Stabb."

The next clause originally read as follows: "I give and bequeath to the two daughters of my said sister Margaret Vaux, Bessie and Ada, each, the sum of three hundred dollars. I also give to the said Bessie and Ada, each, one half dozen silver teaspoons. I also give to the said Ada Vaux my gold watch." The changes made are these: The name "Bessie" has been drawn through with an ink line where it first occurs and marked over with a pencil in the other place. The word "watch" has been marked over with a pencil. To the clause have been added in ink the words, "To be given to Mrs. Ada Vaux Stabb;" and these words have been marked over with a pencil.

In the next clause but one, a bequest of two hundred dollars has been changed by writing in ink the word "four" over

the word "two," and by writing in the margin the word "four" and the figures "400." In the next clause the name of the legatee and the words designating the amount have been drawn through with an ink line. Other similar changes have been made. New bequests have been written in the margins, and one of these has been marked over with a pencil.

First, then, do the attempted changes constitute a revocation of the will? V. S. 2354, following the English Statute of Frauds, declares: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction." Do the alterations amount to a revocation of the will by cancellation? The agreed statement of facts does not say that the alterations were made with the intention of revoking the will, and, judging from the alterations themselves, there was no intention to revoke the will as a whole, but, on the contrary, an intention to have it stand with certain changes. There is no interference with the formal parts, and no intention to revoke the whole is anywhere expressed. In these important respects the case differs from *Warner v. Warner's Est.*, 37 Vt. 356, 367, where the testator had written across one page of the instrument, "This will is hereby cancelled and annulled," and under the filing on the outside, "Cancelled and is null and void. I. Warner", and had erased the words, "In testimony whereof I have." We think the attempted changes in the present case cannot be said, as matter of law, to amount to a revocation of the whole will by cancellation, for although they would, if effectual, make of it a very different instrument, yet it cannot be said therefrom that the testatrix would

not have left the instrument as it was in the first place, rather than have died intestate.

The interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will, which was properly executed in its original form. *Wheeler v. Bent*, 7 Pick. 61; *Jackson v. Holloway*, 7 Johns. 394.

Do any of the attempted cancellations of separate clauses constitute a revocation of the will to that extent? If we admit that in some circumstances there may be a partial revocation, we have to take note of certain complications in the present case. This will contains a residuary clause, and every cancellation of a money legacy, and probably, as this will is written, every cancellation of a specific legacy as well, works a corresponding increase in the residuary clause. *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32. If there had been no residuary clause, the cancellation of a legacy would merely have left that part of the estate to be distributed as if no will had been made, and the rest of the will would operate as before; but here the cancellation gives the residuary clause a different operation. This has been held to prevent the attempted cancellation from operating as a partial revocation. *Miles' Appeal*, 68 Conn. 237, 36 L. R. A. 176. But if we should hold otherwise upon this point, as was done in *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32, we must notice a further difficulty. The testatrix has attempted to substitute a new residuary legatee in place of her deceased sister, Margaret; thus coupling the cancellation of previous bequests, and the consequent enlargement of the residuary bequest, with the substitution of a new residuary legatee; so that it is impossible to say that she would have desired to make any of the cancellations if she had not supposed that the new residuary legatee would receive the benefit arising therefrom. In short, the

alterations, when taken together, rebut the presumption of an intention to cancel any clause by itself and independently of other attempted changes and additions which are ineffectual for want of formality.

An act which might otherwise amount to a cancellation of an entire will has been held not to work that result because accompanied by other acts showing that the intention to cancel was conditional, and not absolute, as where the testator wrote upon the will the word "Cancelled," but further wrote that he intended making another will, "whereupon I shall destroy this." *In Re Brewster*, 6 Jur. (N. S.) 56, 29 L. J. P. and D. 69; Woerner's Am. Law of Administration, sec. 48, with citations. So, likewise, where the testator includes an express clause of revocation in a later will, which fails to take effect through some defect therein, but not where it fails through some cause *dehors* the instrument. *Hairston v. Hairston*, 30 Miss. 276.

Jarman on Wills, vol. I, p. 294, states the rule thus: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails, also, and the original will remains in force." The words "or any other cause" may give the rule too much breadth, but they may be omitted without impairing the rule for our purpose. Similarly it is said with respect to partial obliterations or cancellations that if they are made with the intention of substituting other words for those cancelled, and such intention is frustrated, there is no revocation. Woerner's Am. Law of Administration, sec. 49; Jar-

man on Wills, vol. I, p. 295, with the cases cited by both authors.

As before remarked, the agreed statement upon which this case is tried, while it says that the alterations are all in the testatrix' handwriting, does not say with what intention they were made. Consequently we can assume only such intention as the acts necessarily imply. The intention to revoke is indispensable to a revocation, whatever the act may be; and here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependently upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing; and the will must be established as it was originally executed.

Judgment reversed and cause remanded.

MINNIE M. WIDBER v. L. J. BENJAMIN.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON and
STAFFORD, JJ.

Opinion filed February 5, 1903.

Replevin—Jurisdictional value—Erroneous judgment.

In replevin for goods unlawfully taken or detained, the jurisdictional value of the goods is to be determined by the certificate of the officer serving the writ.

It is error for the County Court to render judgment for the return of the property replevied, in an action of which it has no jurisdiction.

REPLEVIN for goods unlawfully taken and detained. Heard on the defendant's motion to dismiss for want of jurisdiction, at the March Term, 1902, Washington County, *Haselton*, J., presiding. The Court sustained the motion and rendered judgment for the return of the goods replevied and for the defendant to recover one cent damages and costs. The plaintiff excepted.

H. C. Shurtleff for the plaintiff.

So far as the motion to dismiss is founded on what appears in the appraisal and the officer's return, objection should have been taken at the first term, and not having been so taken, all objections thereto have been waived.

On motion to dismiss, the Court can only consider what is on the face of the pleadings or admitted by plaintiff's own proof. Such a motion does not allow the joining and trial of any issuable fact thereon. *State v. Haynes*, 35 Vt. 565; *Fiske v. Wallace*, 51 Vt. 418; *Landgrove v. Plymouth*, 52 Vt. 510.

The amount in controversy determines the question of jurisdiction. The value of the goods for which the writ is sued out governs. If the County Court had jurisdiction when the writ was issued, that jurisdiction continued, and could not be interrupted by the fact that the officer was unable to ferret out the methods of the defendant in selling the property which is conceded by him to be in existence and his possession. *Sanborn & Catlin v. Chittenden*, 27 Vt. 171; *Davenport v. Burke*, 9 Allen, 116; *Eldrid v. Woolaver*, 46 Mich. 241; *Gottschalk v. Klinger*, 33 Mo. App. 410.

It was error for the trial Court to render judgment that the property which the officer succeeded in finding be returned to the defendant. *Machine Co. v. Holden*, 73 Vt. 396.

Fred L. Laird for the defendant.

The writ in this case was properly dismissed as the goods in controversy did not exceed in value \$20.00. The action of replevin is statutory. V. S. 1471 provides that in cases where the value of the goods exceeds \$20.00, the writ shall be returnable to the County Court. V. S. 1040 provides that where the value of the goods does not exceed \$20.00, then a justice has jurisdiction.

WATSON, J. The value of the goods named in the writ exceeded twenty dollars, but the value of those actually found and taken on the writ was certified by the officer in his return to be six dollars and seventy-five cents. The action was brought to the County Court, and it was there dismissed for want of jurisdiction, and judgment rendered for the return of the property, and for the defendant to recover one cent damages and costs. To the judgment that the Court was without jurisdiction, and for the return of the property, the plaintiff excepted.

A justice has jurisdiction of actions of replevin for goods and chattels when the value thereof does not exceed twenty dollars, and the County Court has jurisdiction when the value exceeds that sum. V. S. 1040, 1470. But whether the jurisdictional value is to be determined upon the goods and chattels named in the writ, or only upon those actually replevied, is the question.

When beasts distrained or impounded are replevied, the writ shall not be served until the plaintiff, or some one in his behalf, executes and delivers to the officer a bond to the defend-

ant in a penalty double the value of the property to be replevied, with condition to prosecute the replevin to final judgment, and pay such damages and costs as the defendant recovers against him, and also to return the property in case such is the final judgment. The writ shall require the bond to be given for double the value of the property, but shall not state the amount thereof, and, unless the parties agree upon the value of the property, it shall be ascertained by three disinterested persons, to be appointed and sworn by the officer. The officer is required to return with the writ the bond, which shall be left with the clerk of the court, or the justice, and shall include in his return a certificate of the value of the property. If it appears from the return of the officer that the value of the property so certified does not exceed twenty dollars, the writ is to be returned to the justice who signed it; but if the value thereof exceeds that sum, the writ is to be returned to the County Court, and entered and docketed therein like other original actions. V. S. 1458-1462.

Thus in actions to replevy beasts distrained or impounded, the jurisdictional value is, by statute, determined upon the value of the property replevied, as certified in the officer's return.

In actions to replevy goods unlawfully taken or detained, of the value of more than twenty dollars, the officer, before serving the writ, is required to take from the plaintiff a bond to the defendant, and ascertain the value of the goods or chattels, as provided in replevin for beasts distrained, and return the bond to the clerk of the court to which the writ is returnable. V. S. 1472. And in replevin before a justice the same provisions of law apply, except that the bond is returned to the justice, and the service and return of the writ are governed by the law regulating justice suits. V. S. 1486.

The statute contains no specific provision fixing the basis of the jurisdictional value in an action to replevy goods or chattels unlawfully taken or detained, nor of the method of ascertaining such value; but no good reason is apparent why they should not be the same as in an action to replevy beasts distrained or impounded, and we think such was the intent of the legislature. It is said in a recent work of some merit, that "this value when necessary to be ascertained, as a jurisdictional step in replevin, is usually assessed by appraisers which [whom] the statute provides the officer shall call for that purpose." Shinn on Replevin, sec. 356.

It follows that the Court was without jurisdiction, and that the action was properly dismissed.

It was error, however, to render judgment for the return of the property; for the Court being without jurisdiction it could only render judgment dismissing the action, and for costs. *Collamer v. Page*, 35 Vt. 387.

Judgment reversed, and judgment that the action be dismissed, with costs.

EDWARD H. DEAVITT v. WASHINGTON COUNTY.

October Term, 1902

Present: ROWELL, C. J., TYLER, MUNSON, STAET, STAFFORD and
HASELTON, JJ.

Opinion filed February 5, 1903.

*Deed—Construction—Easement—Eminent Domain—
Allegations.*

A deed which grants the use, in common with the grantor, of a dooryard adjacent to the granted premises, creates an easement in such dooryard.

Such an easement inures to the benefit of the grantee's heirs and assigns, when such appears to be the intent of the grant.

While the *habendum* of a deed cannot enlarge the grant, it may be called in to aid in its construction.

An easement can be taken by right of eminent domain, and, when it attaches to the land itself, it is acquired by condemnation of the land.

An easement in fee cannot be extinguished by an unauthorized use of it.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the September Term, 1902, Washington County, *Watson*, Chancellor. Demurrer sustained. The orator appealed.

Edward H. Deavitt, pro se.

The deed of May 4, 1851, created an easement in the dooryard. *Cross v. Pike*, 59 Vt. 324; *Hale v. Barrows*, 22 Vt. 240; Wash. Easements, 511; *Rowbotham v. Wilson*, 8 E. & B. 143; *Crawford v. Neff*, 3 Walk. 61.

The three things to be considered are the deed, the situation of the parties, and the purpose of the grant. In the case at bar:

(1) The deed does not undertake to convey any interest in the land comprising the dooryard,—the language refers to use and occupation, and nothing is said concerning the land itself.

(2) The situation of the parties was such that after the conveyance of 1851, it was necessary for William to go across his father's dooryard to get to the highway.

(3) The purpose seems to have been a grant of the father to the son of a right of way across the dooryard to the highway.

Such a construction of the transaction gives a natural and ordinary meaning to the language of the conveyance.

But whether the right granted was an easement or mere license, the defendant did not acquire it by condemnation proceedings; and in either event, the right was destroyed by taking the land for the purpose of a county jail, and it makes no difference whether the right was personal to William Howes, or descended to his heirs. *Clark v. Glidden*, 60 Vt. 702; 3 Kent's Com. 592.

It might be inferred that the deed granted the privilege of occupancy as long as both parties desired; but no burden was attached to the land of Joseph Howes, and the *habendum* to William and his heirs is not consistent with such a construction, because the conveyance of the fee of the land described by courses and distances would require such an *habendum* had the language concerning the dooryard been left out entirely. Nor can the *habendum* extend the meaning of the terms used in premises. *Smith v. Pollard*, 19 Vt. 272.

But assume that the clause in question created an easement, and that there existed a right of way across the dooryard at the time of the condemnation proceedings; when the William Howes land was taken by right of eminent domain for a public purpose, the easement was extinguished, for that was a different purpose,—an additional burden upon the dooryard parcel, and no compensation was tendered the owner therefor. Wash. Easements, Chap V., s. 3; *Rutt v. Tyler*, 3 Day, 470; *In Re Private Road*, 1 Ashm. 417; *Hills v. Miller*, 3 Paige, 254; *Hancock v. Wentworth*, 46 Mass. 446; *Manure Company v. Donald*, 4 H. & N. 8; *Central Wharf v. India Wharf*, 123 Mass. 567; *Society v. Railroad Co.*, 3 Hill 567; *Starr v. Railroad*, 24 N. J. 592; *Indianapolis v. Kingsbury*, 101 Ind. 200.

When the William Howes house ceased to be used for a dwelling, was moved away, and the county jail erected, the easement was at an end. Wash. Easements, 533; *Hahn v.*

Baker Lodge, 21 Ore. 30; 10 Am. & Eng. Enc. 438; *Gerrard v. Cook*, 2 B. & P. 109.

If the right in question were treated as a way of necessity, it would be extinguished when the owner of the dominant estate could pass without interruption over his own land to the highway. This the county can do. So the reason and necessity for the easement have ceased. Wash. Easements, II Chap., s. 2; *Hahn v. Baker Lodge*, 21 Ore. 30; *Viall v. Carpenter*, 14 Gray 126; *Smith v. Tarbox*, 31 Conn. 581.

The orator being in possession of the land in question, a bill in chancery is the proper remedy, for by that he obtains discovery of the defendant's title, and if the orator establishes his own, he is entitled to an injunction restraining the defendant from setting up an adverse title. *Hyser v. Mansfield*, 72 Vt. 71; 4 Dest. Fed. Pro. 468; *Eldridge v. Smith*, 34 Vt. 484; *Hodges v. Griggs*, 21 Vt. 280; *Shults v. Shults*, 159 Ill. 654; Note to *Helden v. Helden*, 45 Am. St. Rep. 373.

Senter & Senter for the defendant.

A careful consideration of every part of the deed of 1851, indicates that the grantor intended to reserve an equal interest with the co-tenant in the dooryard, and that this reservation should not be construed to be a personal one, only. There is no forfeiture provided for in this deed. He parted with the title absolutely, and the orator owns no more interest in that dooryard than Joseph Howes did after the execution of the deed.

Under the allegations in the bill, Mrs. Walton was a tenant in common with the orator's grantor in the use reserved of the land in question. This was such a right in property that the power of eminent domain could be exercised, and it could be condemned, as it was. Lewis Em. Dom., s. 262, a; Mills

Em. Dom., s. 31; *Railroad Corp. v. Railroad Co.*, 2 Gray 35; *Black v. Canal Co.*, 22 N. J. Eq. 416; *Railroad Co. v. Kerr*, 72 N. Y. 330.

ROWELL, C. J. On May 14, 1851, Joseph Howes owned two dwelling-houses in Montpelier Village, situated on the west side of Elm street. He lived in one, and his son William, in the other. He owned a dooryard extending to the street, and his house fronted it to the south, and William's to the east. On that day, by a quitclaim deed in usual form, he conveyed to William the house in which William lived, and the lot on which it stood, describing it by courses and distances, but not including the dooryard. In the granting part of the deed, immediately following the description, are these words: "And the dooryard as now fenced, is to be used and occupied by the said William and myself in common; and neither is to do any act or thing to incommode the occupancy of the other; and both are to share equally in fencing the same." It was necessary for William to cross this dooryard, to get to the street. William's title came to and vested in Mrs. Walton through several mesne conveyances, and the County has entered upon and taken her land by statutory authority for the site of a County jail, and also took, specifically, as far as it could, her interest in the dooryard; but the orator denies that it thereby acquired that interest.

Joseph's title to the premises and rights not conveyed to William, has come to and vested in the orator, who is in possession of the property, and wants to erect a building on the dooryard, and prays for a decree that the County has no interest nor estate therein; that the orator's title thereto is good and valid; that the County be perpetually enjoined from asserting claim thereto adverse to the orator; and for general relief. The bill is demurred to for want of equity.

The orator does not really claim that the deed to William did not create an easement in the dooryard, but rather concedes that it did, at least to the extent of a right of way to the street, but contends that whatever the right, it was personal to William, and if not, that it was extinguished when the County took the land for a jail, as that is a different use and an additional burden, for which no compensation was tendered to the owner of the dooryard.

It is clear that the deed did not convey the fee of the dooryard, but created only an easement therein, for it did not grant the whole use and occupancy, but only a use and an occupancy in common. *Tupper v. Ford*, 73 Vt. 85, 50 Atl. 547. And the fair import of the language, construed in the light of the attendant circumstances, makes the easement one, not only of a right of way, but of use and occupation in common for the general purposes of a dooryard as well. And the intent of the deed seems to be that the easement should enure to William's heirs and assigns, for the *habendum* mentions them, and although it cannot enlarge the grant, it may be called in to aid in its construction, and the word "premises" used in the *habendum* may apply to the easement as well as to the land. *Cummings v. Dearborn*, 56 Vt. 441. Indeed, such an easement is land, under our statute, for it is an hereditament. V. S. 9.

The easement attached, and is appurtenant, to the land conveyed to William, and enured to the County, especially as it is in privity of estate with William, the bill admitting for present purposes that the County acquired title to said land by its condemnation proceedings. And it still has the easement, unless it has lost it in the way claimed by the orator.

But it is not essential that the County should be in such privity, having entered upon the land, for, as pointed out in

Morton v. Thompson, 69 Vt. 432, 38 Atl. 88, there is a distinction between things that run with the estate in the land, as, for instance, a right of way granted by a tenant for years, and things that are attached to the land itself. In the latter case, of which easements like the one in question are a conspicuous example, when the right is once acquired, whether by prescription, grant, or covenant, it attaches to the land for the benefit of which it was acquired, and sticks to it so fast that it goes with it, regardless of privity, into all hands, even those of a disseisor. It is immaterial, therefore, whether the County acquired the easement specifically by its condemnation proceedings, for it sticks to the land, which confessedly it did acquire. But as the bill admits that those proceedings "were in accordance" with the act authorizing them, no reason is apparent why the County did not thereby acquire the easement, if it was within the scope of the act to do so, which is not denied, for an easement can be taken by the right of eminent domain as well as land, according to the authorities.

But the orator claims, as we have said, that the County lost the easement when it took the land for a jail, as that is a different purpose and a more burdensome use, for which no compensation was tendered. The bill does not allege that the use is different, save what may be inferred from the allegation of purpose for which the land was taken, nor allege, by implication even, that it is more burdensome, and therefore we cannot say that it is.

But as this is an easement in fee, it cannot be extinguished by an unauthorized use of it. If put to such use, forfeiture is not the remedy.

Affirmed and remanded.

STATE v. MILO E. BENTLEY.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON and
STAFFORD, JJ.

Opinion filed February 5, 1903.

Divorce—Remarriage—Validity—Evidence.

The provision of the New York Code, prohibiting the subsequent marriage of a libellee in divorce proceedings, applies only to persons divorced in that State, and does not render invalid the marriage there of a person divorced in this State.

INFORMATION FOR BIGAMY. Plea, not guilty. Trial by jury at the June Term, 1902, Windsor County, *Haselton, J.*, presiding. Verdict, guilty; and judgment thereon. The respondent excepted.

The State proved the respondent's marriage at Bethel, Vt., on December 28, 1901, to one Isabel Palmer, and his previous marriage at Whitehall, N. Y., on March 23, 1899, to one Lenora Whitmore, who was still living. The respondent claimed that the Whitehall marriage was void, because within three years prior thereto a former wife, then a resident of Whitehall, had obtained a divorce from him in this State for a cause other than adultery, and the law of New York prohibited the remarriage of a libellee in divorce proceedings for a period of three years. It was in support of this claim that the evidence referred to in the opinion was offered.

John J. Wilson for the respondent.

This case is very similar to *State v. Shattuck*, 69 Vt. 403; in that case, however, the marriage in dispute was contracted in New Hampshire, and no evidence was offered that the law of that State restricted the marriage of the guilty party in di-

voice proceedings. In this case, the evidence excluded was offered to supply this deficiency.

It is shown that the law of New York grants divorces for adultery only. The law of this State grants divorces for other causes, but as to the marriage of the guilty party, the laws of both States are similarly restrictive—the law of that State restricting the marriage of the guilty party divorced for the cause recognized there, and the law of this State restricting the marriage of the guilty party divorced for the causes recognized here.

These statutory provisions established for the purpose of public policy have the same weight and authority as the common law, and should have the same consideration from the Court.

Charles P. Tarbell, State's Attorney, for the State.

The Whitehall marriage was valid. *State v. Shattuck*, 69 Vt. 403; *State v. Richardson*, 72 Vt. 49. By the New York law, the marriage of a divorced party is only prohibited when the divorce is granted for adultery. The divorce in this case was for a cause other than adultery.

WATSON, J. The respondent excepted to the exclusion of the statutory law of New York, with a decision of the highest court of that State construing the same, to the effect that a dissolution of marriage could be granted there only for the cause of adultery, and that, when a marriage is dissolved pursuant to such law, for that cause, the libellee shall not marry again, unless it be to the libellant, until the death of the libellant; and this is the sole question before us.

It is sufficient for this case that the law of New York offered in evidence prohibits the subsequent marriage of a libellee only when the marriage has been dissolved under the

provisions of that law. By express terms, it has no application when the dissolution was granted in some other territorial jurisdiction. The evidence offered had no tendency, therefore, to show that the respondent's marriage at Whitehall, in the State of New York, was illegal, and it was properly excluded.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions. Let execution be done.

H. M. DUFUR v. BOSTON & MAINE RAILROAD.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, STAFFORD and
HASELTON, JJ.

Opinion filed February 9, 1903.

Negligence—Joint tortfeasors—Release of—Effect.

A declaration alleging that the defendant ran its car upon a side-track, and, while it stood there with the plaintiff as a passenger therein, allowed and caused another person to shoot a rifle toward and into the car, thereby injuring the plaintiff, shows a joint liability for negligence on the part of the defendant and such other person.

The discharge of one of two tortfeasors bars an action against the other.

That a plea amounts to the general issue cannot be taken advantage of by general demurrer.

CASE FOR NEGLIGENCE. Pleas, the general issue and four special pleas in bar. Heard on the plaintiff's general demurrer to the defendant's fourth and fifth pleas, at the June Term, 1902, Orange County, Rowell, C. J., presiding. Demurrer

overruled and pleas adjudged sufficient. The plaintiff excepted.

D. S. Conant and *R. M. Harvey* for the plaintiff.

The fourth plea is insufficient, because it is apparent that the causes of action in the Allen suit and in this suit are not the same. The charge against Allen was for wilfully and negligently shooting Dufur. If that charge was true, the defendant here was not in any way liable. There was nothing in that declaration, or in the settlement set out, to indicate that this defendant was at fault in connection with Allen. From the facts set out in this declaration and plea, it appears that Allen could not be liable in this action. It is charged in this declaration that the shooting by Allen was allowed and caused by this defendant; and there is no suggestion that Allen was either wilfully or negligently at fault. In order to make the settlement pleaded a sufficient answer to the declaration, it must appear that Allen was jointly liable with this defendant or that he would be ultimately liable to it. That the plaintiff and Allen settled that suit is immaterial here, unless some allegation of fact is made, which, if true, would show the two causes of action to be identical.

The same is true of the fifth plea, which shows upon its face that Allen was never guilty of any of the wrongs charged in either or both of said suits. The charge here is against this defendant alone, and all traversable matters alleged in the declaration are confessed by this plea. Stephen Pl. 217; *Lyman v. Railroad Co.*, 59 Vt. 167-175.

If it should be claimed that Allen's shooting was the proximate cause of the injury, we say that the declaration and pleas show that he was the innocent cause. *Templeton v. Montpelier*, 56 Vt. 328; *Coggs v. Bernard*, 1 Smith Lead. Cas. (7th Am. Ed.) 433.

"The presumption of negligence is against the carrier when an accident has happened, and on him lies the *onus* of proving care." *Coggs v. Bernard*, *supra*; *Holbeck v. Railroad*, 16 Barb. 113; *Wilke v. Bolster*, 3 E. D. S. 332; *Steamboat v. King*, 16 How. 477.

No concert of action between Allen and the defendant is charged. Allen is not alleged to be a wrong-doer at all. In fact, the fifth plea shows that Allen was innocent. *Williams v. Sheldon*, 10 Wind. 654; *Guille v. Swan*, 10 Am. Dec. 234; *Wood v. Sutcliff*, 8 E. L. & Eq. 217; *Company v. Richards*, 98 Am. Dec. 209; *King v. Bevins*, 1 D. Chip. 178.

If Allen was a stranger to this cause of action, he could not discharge the defendant by payment; nor could the plaintiff by releasing Allen release the defendant. *Grymes v. Blofield*, Cro. Eliz. 541; *Edgecombe v. Rodd*, 5 East, 294; Comyn's Dig. tit. "Accord;" *Clow v. Barst*, 6 Johns. 37; *Blum v. Hartman*, 3 Daly, 47; *Stark v. Thompson*, 3 T. B. M. 296; *Brown v. Inhabitants*, 63 Me. 241; *Daniels v. Hollenbeck*, 19 Wend. 410; *Thermon v. Wild*, 39 E. C. L. 252; *Hawkshaw v. Rawlings*, 1 Strange, 24; *Beakley v. White*, 4 Paige, 656; *Muller v. Eno*, 14 N. Y. 604; *Dock Co. v. Mayer*, 53 N. Y. 67.

This case resembles the case where the insurer pays damages for an accident. In such cases, the defendant can have no benefit from such payment. *Yates v. Whyte*, 33 E. C. L. 349; *Bradburn v. Railway Co.*, *Id.* 439; *Harding v. Townshend*, 43 Vt. 536.

Young & Young for the defendant.

The acts of the defendant were not the immediate cause of the injury. In a legal sense, neither the fact that plaintiff was in this car, nor the fact that defendant set and left the car where it did, was the immediate or proximate cause of the

injury. Therefore the fifth plea bars the action. There being no negligence on the part of the defendant, there is no liability. *Thomp. Neg. s. 2778*; *Wood Ry. L. 1076-1078*, and cases; *Elliott Railroads, s. 1591, 1696*; *Railroad Co. v. McKenney, 124 Pa. St. 462*; *Thomas v. Railroad Co., 148 Pa. St. 180*; *Fredericks v. Railroad Co., 157 Pa. St. 103*; *Fay v. Kent, 55 Vt. 557*; *Kennedy v. Morgan, 57 Vt. 46*; *McLeod v. Railroad Co., 58 Vt. 727*.

The release of Allen bars this action, because Allen and defendant were joint tortfeasors, if this defendant was ever liable. *Brown v. Marsh, 7 Vt. 320*; *Chamberlin v. Murphy, 41 Vt. 110*; *Eastman v. Grant, 34 Vt. 387*; *James v. Aiken, 47 Vt. 23*; *Thompkins v. Railroad Co., 66 Cal. 165*; *Seither v. Traction Co., 125 Pa. St. 397*; *Spurr v. Railroad Co., 56 N. J. L. 346*; *Livingston v. Bishop, 1 Johns. 290*; *Jaggard Torts, s. 117*; *Addison Torts, s. 1353*; *2 Hilliard Torts, 329*; *Hale v. Spalding, 145 Mass. 482*; *Urton v. Price, 57 Cal. 270*.

TYLER, J. The first count in the declaration alleges, in substance, that the defendant was a common carrier of passengers over its railroad; that it received the plaintiff, on payment of his fare, to carry him safely from Bradford to White River Junction; that it neglected its duty by running the car in which he was a passenger upon a side-track before the train reached the latter place and allowing it to stand there for a long time; that the plaintiff had no opportunity to leave the car, but, by the defendant's direction, through its officers and agents, remained therein; that one Allen, with the defendant's knowledge and permission, then kept and for a long time before had kept a target for rifle practice, in such a situation in respect to the car, that a bullet from his rifle might and would pass into the car; that the defendant knew that Allen was engaged in firing at said target directly towards the car, and that

the plaintiff, without negligence on his part, was struck by a bullet from Allen's rifle, and injured.

The second count only differs from the first in alleging that the defendant allowed and caused Allen to shoot his rifle towards and into the car; that the car was defective in its construction, and that, by reason thereof, when the plaintiff was hit by the bullet he was thrown down and injured.

The defendant, in its fourth plea, sets up in defence to the action that soon after the plaintiff received his injuries, as alleged, he brought a suit against Allen to recover damages therefor, which suit was entered in Windsor County Court; that Allen entered an appearance, and afterwards settled with the plaintiff, and paid him a large sum of money, which the plaintiff received and accepted in full settlement, satisfaction and discharge of all causes of action in the declaration mentioned, and gave him a written release under seal of all such causes of action. This plea sets out the declaration in the Allen suit, the first count of which is in trespass for a common assault; the second, for an assault by shooting at the plaintiff with a loaded rifle and injuring him; the third, in case, alleging negligent handling and shooting of the rifle, whereby the plaintiff was hit and injured. It recites the release and alleges that the causes of action in the two suits were identical.

The fifth plea admits the placing of the car, with the plaintiff therein, upon the side-track, and alleges a necessity for so doing, in that the main track was then temporarily occupied by other cars; denies all knowledge of Allen's intention to shoot on the occasion alleged; admits his shooting, but says it was without the defendant's consent or knowledge, and against its will; alleges that the bullet struck a knot in a post at which Allen fired his rifle, glanced to the car and hit the plaintiff, and that its hitting the car and the plaintiff was ac-

cidental; that Allen did not anticipate, and had no reason to anticipate, an injury to any person. This plea also alleges a settlement and release. To these pleas the plaintiff demurred generally.

The defendant relies upon the settlement and release as a bar to the action.

The plaintiff contends that the fourth plea is insufficient; that it appears upon its face that the causes of action in the two suits were not the same; that the allegation of identity in the fourth plea is inconsistent with the facts set out in the declaration in the Allen suit, in which it was alleged that Allen wilfully and negligently shot and injured the plaintiff, but that it contained no allegation that the defendant was in fault in connection with Allen, and jointly liable with him; that upon the declaration and pleas in this case, Allen was not a wrongdoer, but a stranger to the cause of action set out in the declaration; that, even if he were guilty of negligence, he did not assume to settle for the defendant's wrongful act; and that the payment and release did not affect the defendant's liability. The plaintiff says that the defendant relies upon one set of facts to bar this action, but requires the plaintiff to answer other facts inconsistent with those pleaded in bar. The plaintiff makes substantially the same claim in respect to the fifth plea. His contention is, in brief, that his suit against Allen was only for the latter's wrongful act, and that therefore the settlement and release did not affect the defendant's liability; that this suit is for the defendant's wrongful act; that neither the declaration nor the pleas charge that Allen and the defendant joined in the act, and that the two suits were for different causes.

The position cannot be maintained that, upon the facts alleged in the declaration, Allen could not have been liable

either to the plaintiff or the defendant. His act may have been unlawful, though the defendant permitted or even caused him to commit it. If his act was negligent, it is immaterial whether it was done at his own instance or by the defendant's procurement.

Upon the allegations in the declaration, the plaintiff clearly had a right of action against the defendant, whether Allen was liable or not; and, to defeat the action, the defendant must allege facts showing that it was not liable, or that it and Allen were jointly liable, and that the plaintiff released Allen from such liability. If Allen was never liable, then the release given him did not affect the defendant's liability; in that case, the payment by Allen would be the act of a stranger to the cause of action.

But upon the facts alleged in the declaration—that the defendant ran its car upon the side-track, and while it stood there, with the plaintiff therein by its directions, allowed and caused Allen to shoot his rifle towards and into the car,—the defendant and Allen were jointly liable for negligence whereby the plaintiff was injured. The case comes within the rule cited by the defendant from *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533, and applies to both wrongdoers: "If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence." The allegations in the fourth plea of payment, settlement, satisfaction and discharge, the truth of which the demurrer admits, are a bar to this suit.

The defendant's act in placing the car upon the side-track gave the plaintiff no cause of action, and Allen's act would have been harmless if the car had not stood upon the side-track. It was the concurrence of the two acts that caused the

plaintiff's injury; therefore he had a right of action against either wrongdoer, or against both jointly, and in either case he would have been entitled to full compensation for his injury. He elected to sue and settle with Allen, and he discharged the cause of action in express terms, which released both wrongdoers from further liability. The plaintiff could have only one satisfaction for his injuries. *Eastman v. Grant*, 34 Vt. 387; *James v. Aiken*, 47 Vt. 23; Cooley on Torts, 139.

Jaggard on Torts, §117, states the rule: "While separate suits * * * may be brought against several defendants for a joint trespass, and while there may be a recovery against each, there can be but one satisfaction. It is immaterial whether the satisfaction is obtained after judgment, or by amicable adjustment, without any litigation of the claim for damages. The essential thing is the satisfaction. Therefore, where a passenger, injured in a street car collision, for a sum paid, released the carrier company from all liability for the injury, he thereby discharged the liability of the other company also. The rule was applied notwithstanding evidence that the other company was really to blame, and although the right of action against it was expressly reserved. The reasoning of the English cases is that the cause of action against joint tortfeasors is one and indivisible, and having been released as to one person, consequently is released as to all persons otherwise liable. The American cases recognize one satisfaction as a bar to suit against joint tortfeasors. When the cause of action is once satisfied, it ceases to exist."

The defendant, in its fifth plea, states an apparent necessity for the car standing upon the side-track; avers that on this occasion it had no reason to apprehend that Allen would shoot in that direction; and that, from the situation of the car and the target, Allen had no reason to anticipate that any person

would be injured by his shooting; and denies that either the defendant or Allen was negligent. The plea is, in legal effect, the general issue. All the facts therein alleged may have existed, and the defendant and Allen not have been in the exercise of the care of a careful and prudent man. If Allen was in the habit of using this space for target practice, and was so using it on this occasion, it is a question of fact whether the defendant's officers and agents, in the exercise of the high degree of care required of carriers of persons, ought not to have known of it and guarded their passengers from injury; and, though Allen had no reason to anticipate danger to any person by shooting across this space, a careful and prudent man, placed in Allen's position, might have anticipated danger.

But the fact that the fifth plea amounts to the general issue cannot be taken advantage of by general demurrer. *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679; 1 Ch. Pl. 527-8.

The pro forma judgment, overruling the demurrer to the fourth and fifth pleas, and holding those pleas sufficient, is affirmed, and cause remanded.

ROSS HUNTER v. THOMAS EMERSON and MINNIE J. EMERSON.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD and
HASLTON, JJ.

Opinion filed February 9, 1903.

Adverse possession—Elements of—Permissive use.

The open, notorious and continuous taking of water from a spring, for a period of more than fifteen years, is permissive, and not adverse

and under a claim of right, when it is consistent with another's title, though no express license is given.

APPEAL IN CHANCERY. Heard on master's report and the orator's exceptions thereto, at the March Term, 1902, Washington County, *Start*, Chancellor. Decree, *pro forma*, for the orator. The defendants excepted.

Gordon & Jackson for the defendants.

The report of the master shows that the defendant Thomas Emerson and his predecessors in title, had, for more than thirty years, been in the open, notorious, and adverse possession of the spring, and land about the same included within the fences.

Richard A. Hoar for the orator.

Whatever right the defendants may have acquired by prescription is limited to their enjoyment of that right. Gould on Waters, s. 342; Jones Ease., s. 200. The defendants' use must be continuous and apparent, open and visible; and it must be exercised under a claim of right adverse to the owner and acquiesced in by him. *Ib.* s. 164. No easement can be acquired where the privilege is used by the express or implied permission of the owner. *Ib.* s. 179.

The report shows that the use which the defendant made of this spring was permissive, and not adverse.

TYLER, J. It appears by the master's report that the orator owned two pieces of land, adjoining each other, which he bought of one Gouldsbury in 1890 and 1895, respectively, and that he built a house upon the first piece soon after its purchase; that the defendants, since 1880, have lived in the house then bought by said Thomas Emerson of one Rice, whose title is traced back to 1850. It further appears that the defend-

ants, since 1880, and those who had owned and occupied the house before them for forty years prior thereto, had obtained all the water necessary for domestic purposes from a "log spring" situated upon the second piece of land purchased by the orator; that in 1893 the defendants made an excavation in the ground near the spring, upon the second piece of land purchased by the orator, and that the water percolated through the soil and filled the place, so that the defendants after that time got water there; that the following year, without the orator's knowledge, they put in a box to collect and hold the water; that when the orator learned of it, in 1897, he objected, and requested the defendants to remove it.

After the orator moved into his house, in 1890, he used water from this spring in dry seasons, as he had occasion, and he also gave his neighbors the privilege of taking water there, but he got most of his water supply from another spring.

The orator claimed exclusive ownership of the spring by virtue of his title to the two pieces of land, and that the defendants got water therefrom only by his permission. The defendants claimed ownership of the spring by their own and their predecessors' long continued use of it; that such use had been open, notorious, and exclusive. It appears that, prior to the time the orator's house was built, the defendants and their predecessors in the ownership of the defendants' house had been the only users of the water, with the exception that passers by and workmen occasionally got water there to drink.

In 1899, the orator filled the log with stones so that no water could afterwards be obtained; the defendants put a cover upon the box and locked it; the orator forced the box open, and he and several of his neighbors continued to get water at that place,—the defendants objecting to their so doing.

It appears that for more than twenty years prior to Gouldsbury's purchase of the land in 1883, there had been a trough situated in a lane near the spring for holding water that came from the "log spring" for the use of cattle in the Gouldsbury pasture; and the master finds that the water found its way by percolation from the spring to the trough which was sunk in the ground.

The master finds, in effect, that if the defendants acquired any right to take water from the spring, it was not by the orator's license to them; and he submits the question whether, from the facts reported, the defendants acquired title by adverse possession.

The partial fencing around the spring, as reported, did not give the defendants such title, for it does not appear whether the fence was built by the owners of the Emerson house in assertion of their right to the spring, or for its protection; besides, it was not constructed so as to exclude other persons than the defendants from using the water. Nor did the defendants acquire title by placing the box in the ground, for the box was not maintained there long enough to acquire title by that means.

The report only shows that the defendants, and those who occupied their house before them, had for a long time taken water from the spring for family use, and that for the last thirty years they had taken it from a hollow log that stood in the spring.

While the case shows a continuous taking of the water, and for a much longer time than was necessary to acquire a right by adverse possession, and the taking was open and notorious, it was a permissive taking, consistent with the orator's title, and not adverse and under a claim of right. It is true the master finds that the defendants did not obtain a right by

the license or consent of Gouldsbury while he owned the orator's house, yet it may have been permissive in a legal sense. In *O'Neil v. Blodgett*, 53 Vt. 213, it was held that merely using a way open to and occupied by the public for the purpose of getting water for cattle and a family, had no tendency to prove an adverse use; that such use must be made under a claim of right, brought to the attention of the owner of the land. And where there was a subsidence of the water in a mill pond, leaving it dry, so that cattle in an adjoining pasture could and did wander over the bottom of the former pond, it was held that such possession of the land was permissive and not adverse. *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 695. See, also, *Plimpton v. Converse*, 44 Vt. 158.

In this case the master finds no fact indicating that the defendants began to take water from the spring, under a claim of right to take it, making their claim known to the owner of the orator's premises, but the taking seems to have been as a matter of convenience to the defendants,—the orator and his predecessors in title making no objection until they had occasion to use the water themselves. Upon these facts, the defendants acquired no right, and the *pro forma decree must be affirmed and the cause remanded*.

GEORGE W. WILDER'S EXECUTRIX v. GEORGE H. WILDER and
T. J. DEAVITT, TRUSTEE.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, STAFFORD and
HASELTON, JJ.

Opinion filed February 9, 1903.

*Implied trust—Payment of mortgage—Subrogation—Right of
Executor—Jurisdiction—V. S. 2494.*

An implied trust arises at the time of the conveyance, and is founded on the payment of the purchase money; a payment made subsequently will not create a trust in favor of the payor.

A life tenant who pays an encumbrance is entitled to subrogation against the remainderman to the extent the latter was bound to pay to protect his estate, without proof of an intention to keep the mortgage on foot; and this right can be enforced by his executor.

That the life tenant makes such payment supposing that he thereby became the owner of the premises in fee does not preclude him or his executor from asserting his right of subrogation.

In such case, the Probate Court cannot grant relief, either by way of subrogation or under V. S. 2494, and resort must be had to the Court of Chancery.

APPEAL IN CHANCERY. Heard on the defendant's demurrer to the bill of complaint, at the September Term, 1902, Washington County, *Watson*, Chancellor. Decree, *pro forma*, sustaining the demurrer and dismissing the bill. The orator appeals.

Frank Plumley and Hogan & Hogan for the orator.

Since the real estate was conveyed to Maria A., she became primarily liable to pay the mortgage thereon. She was the principal and her husband surety. *Cook v. Bherage*, 64 N. E. 603; *Stevens v. Goodenough*, 26 Vt. 676. After the

death of Maria A., George W. was bound, as tenant by courtesy, to keep down the interest on the mortgage,—the obligation to pay the mortgage resting upon George H., as remainder man. *Doane v. Doane*, 46 Vt. 485, 495; *Plympton v. Dispensary*, 106 Mass. 544, 547; *Swayne v. Perine*, 5 Johns. 482, and notes; 1 Story's Eq. Jur., s. 488; 4 Kent's Comm. (10 Ed.) 83. This obligation was not changed by the fact that George W. signed the note. *In Re Freeman*, 116 N. C. 199.

The payment by George W. before foreclosure proceedings had been instituted was equivalent to his redemption of the premises after foreclosure, the estate in remainder being vested in George H., subject to the equitable right of George W. to insist upon full payment of the sum so expended. *Hubbard v. Mill Dam Co.*, 20 Vt. 402; 4 Kent's Comm. (10 Ed.) 83; 2 Jones on Mort., s. 1090; *Wheeler v. Willard*, 44 Vt. 640; 1 Story's Eq. Jur., s. 488; 2 *Id.* 1023.

This payment being made by George W. while he believed that he was the owner in fee, the real estate should be decreed to him as owner by way of resulting trust. *Barron v. Barron*, 24 Vt. 375, 390; *Corey v. Morrill*, 71 Vt. 51, 55; *Wallace v. Bowens*, 28 Vt. 638; *Pitt v. Pitt*, 1 T. & R. 182; *Baget v. Oughton*, 1 P. Will. 347.

At any rate, the orator is entitled to subrogation. *Ward v. Seymour*, 51 Vt. 320; *Field v. Hamilton*, 45 Vt. 35; 1 Jones Mort., s. 878, 881; *Wheeler v. Willard*, 44 Vt. 640; *Miller v. Railroad Co.*, 40 Vt. 349; *Doane v. Wilson*, 63 Vt. 1; *Bullard v. Leach*, 27 Vt. 491; *Shrewsbury v. Earl of Shrewsbury*, 1 Ves. Jr., 233; 2 Jones on Mort., s. 1090; *Ryer v. Gass*, 130 Mass. 227; *Barnes v. Boardman*, 152 Mass. 391; *Young v. Williams*, 17 Conn. 393; 2 Story's Eq. Jur., s. 1023.

T. J. Deavitt and Edward H. Deavitt for the defendants.

There being no duty on the part of George H. to convey or do anything, and he having entered into no agreement to convey or do anything, there is no basis for a decree of conveyance from the defendants or either of them; nor is there occasion for invoking the doctrine of subrogation. George W. simply paid his own debt. The principle of subrogation is applied only when justice and equity demand it. *Bullard v. Leach*, 27 Vt. 491; *Gleason v. Carpenter*, 74 Vt. 399.

If George W. paid this mortgage note by mistake as to its effect, equity will not relieve against it. *Hunt v. Roumaniere's Admrs.*, 1 Pet. 1; *Ripton v. McQuivey's Admr.*, 61 Vt. 76; *Deavitt v. Ring*, 74 Vt. 431; *Story's Eq. Jur.*, s. 113, 114, 115.

START, J. The oratrix, by her bill of complaint, shows that on March 24, 1864, William B. Hubbard conveyed to his daughter, Maria A. Wilder, wife of George W. Wilder, the premises in question. No money passed in the transaction, but the Wilders on the same day mortgaged the premises to Hubbard to secure the payment of a note of \$2,000 signed by them. The Wilders immediately thereafter went into possession, and occupied until the death of Maria A. Wilder, February 8, 1878; and George W. Wilder continued in possession until his death, April 16, 1901. The defendant, George H. Wilder, is the only child and heir of George W. and Maria A. Wilder. The oratrix is the second wife of George W. Wilder, and was married to him May 8, 1884, and thereafter, with her husband, she occupied the premises until his death, and since that time she has occupied as executrix pending a settlement of the estate. The mortgage debt had not been paid when Maria A. Wilder died, and thereafter, on the 20th of March, 1879, George W. Wilder was required by the executor of William B. Hubbard's estate to endorse on the note an

agreement waiving the statute of limitations and promising to pay the note. The estate of Maria A. Wilder was not a party to the agreement. And subsequently, and before his marriage to the oratrix, George W. Wilder paid the mortgage debt. It is alleged that the premises have always been less in value than the amount of the mortgage debt; that George W. never intended such payment as an advancement or gift, either to Maria A.'s estate, or to the defendant George H., but that such payment was made on account of the personal liability of George W., "and for the purpose of protecting and preserving his own right, title, and interest in and to the real estate, both legal and equitable;" that, notwithstanding the record title has always remained in Maria A. Wilder, George W. "always believed, that, upon payment of the entire purchase price of the estate, as hereinbefore set forth, he thereby became the owner of the estate in his own right, in fee;" that George H. never made any claim to the contrary during the life of his father; and that the property was set in the grand list to George W. and he paid the taxes thereon.

March 11, 1891, George W. Wilder made his will, and, after making a few bequests which are not material to the matter here involved, disposed of the residue as follows: "To my wife, Caroline F. H. Wilder, one-half of all the residue and remainder of my estate including the homestead and place where I now live, as a part of her share." The other half was devised to a trustee to be appointed by the Probate Court for the benefit of the defendant George H. Wilder, and defendant Deavitt is such trustee. The will was duly probated, the oratrix duly qualified as executrix thereof, and, as such executrix, brings her bill of complaint. Upon these allegations of the bill, and others which it is not necessary to here state, the oratrix asks for a decree directing the defendants to deed to her

the homestead, or that she may be subrogated to the rights of the mortgagee under the mortgage which was paid, or for such other relief as the Court thinks her entitled to. The cause stands for hearing on demurrer to the bill.

From these facts the law does not imply a trust, and the oratrix is not entitled to a conveyance of the premises. The husband did not purchase the premises, nor did he, at the time of the conveyance, pay or furnish any money toward the purchase price. The wife purchased the premises, and pledged her credit and estate for the payment thereof. It was necessary for the husband to join the wife in the execution of a mortgage of her real estate, in order to create a valid lien in law thereon, and he did so, and in the execution of the note; but he did not pay anything toward the purchase price of the premises, or on the mortgage debt, until after his personal liability therefor was barred by the statute of limitations, nor until after the death of the wife, when the payment of the mortgage debt became necessary to save his life estate in the premises. The payment then made was not a payment of purchase money, or any part thereof, within the meaning of the law relating to implied trusts. The legal title to the premises had vested in the wife long before this payment was made; therefore, a resulting trust in favor of the husband does not attach. A payment subsequent to the conveyance, under such circumstances, will not, by relation, attach as a trust to the original purchase. *Miller v. Blose*, 30 Gratt. 744; *Beecher v. Wilson, Burns & Co.*, 84 Va. 813, 10 Am. St. Rep. 883. A trust by implication of law must result from the original transaction, and arise at the time of the conveyance, and at no other time, and is founded on the actual payment of the purchase money. *Pennock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Botsford v. Burr*, 2 Johns. Ch. 414; *Steere v. Steere*, 5

Johns. Ch. 1; *Watson v. Erb*, 33 Ohio St. 47; *Keller v. Keller*, 45 Md. 272.

At the time George W. Wilder was called upon by the executor of William B. Hubbard's estate to renew the note by an endorsement thereon agreeing to pay the same and waiving the statute of limitations, his personal liability therefor was barred by the statute of limitations, and, as between him and the remainder-man, he was not, and never had been, under a duty to pay the entire mortgage debt; but as the debt was a subsisting incumbrance upon the premises in which he was interested as life tenant, the assumption and payment of the incumbrance by him was necessary to save his life estate therein; and he could assume and pay off the incumbrance, as he did, and keep it on foot as against the remainder-man. The fact that he supposed that he held the title to the premises in fee, and made the payment under such belief, did not disentitle him to assert his right as life tenant paying off the incumbrance, to be subrogated to the rights of the mortgagee, to the extent the remainder-man was bound to pay to protect his estate. His relation to the estate was such that payment of the mortgage debt by him, without proof of an intention to keep the mortgage on foot, entitled him to be subrogated to the rights of the mortgagee, to the extent we have indicated; and that right may be enforced by the oratrix. *Walker v. King*, 44 Vt. 601; *Hubbard v. Ascutney Mill Dam Co.*, 20 Vt. 402; *Wheeler v. Willard*, 44 Vt. 640; *Tarbell v. Durant*, 61 Vt. 516; *Downer v. Wilson*, 33 Vt. 1; *Barnes v. Boardman*, 152 Mass. 391; *Swan v. Swan*, 55 Vt. 583. The case of *Haverford Loan & Building Association v. Fire Association*, 180 Penn. St. 522, 57 Am. St. Rep. 657, is much in point. In that case a husband, supposing, that, under the will of his wife, he was the sole owner of land, paid and caused to be discharged a prior

incumbrance resting upon the entire estate. It subsequently transpired that he owned only an undivided fifth of the land as tenant in common; and it was held that, having relieved the common estate of an incumbrance, he was entitled to contribution from his co-tenants, and could enforce his claim by subrogation to the rights of the mortgagee under the discharged mortgage. Also, in *Coudert v. Coudert*, 43 N. J. Eq. 407, where a testator had no children at the time of making his will, but afterwards children were born and the will held void, and after his decease the widow, supposing that she was the sole devisee, paid and caused to be discharged a mortgage on part of the lands devised to her, it was held that the widow was entitled to have the lien of the mortgage reinstated to secure the money so paid by her, and the land sold to satisfy the same.

The failure of George W. Wilder to examine the records before assuming the payment of the mortgage debt does not disentitle the oratrix to relief by way of subrogation. Had he done so, he would have found that he had a life estate in the premises, and presumably would have understood that he was entitled to protect the same by paying the incumbrance, and that for such payment he could be subrogated to the rights of the mortgagee, to the extent that the remainder-man was under a duty to pay in order to save his estate. By holding as we have, we place the parties in the same situation in respect to the premises that they would have been in had George W. Wilder made the payment with actual knowledge of the extent of his estate therein, and had asserted his right as a life tenant.

The case is not one over which the Probate Court has jurisdiction. It could not grant relief by way of subrogation. *Mann v. Mann's Estate*, 53 Vt. 48. The granting or withholding of such relief is peculiarly within the jurisdiction of the Court of Chancery. *Gerrish v. Bragg*, 55 Vt. 329. Nor

could the Probate Court grant relief under V. S. 2494, which provides that, when a deceased person in his lifetime held lands in trust for another person, the Probate Court may grant license to the executor or administrator to deed such lands to the person for whose use and benefit they are held, for, as we have seen, the wife did not in her lifetime hold the premises in trust for the husband.

Neither the amount for which the oratrix is entitled to be subrogated to the rights of the mortgagee, nor the rents and profits of the premises, are put in issue by the demurrer; and, for this reason, they are not considered.

The pro forma decree is reversed, the demurrer overruled, the bill adjudged sufficient, and cause remanded.

STATE v. PETER MANNING.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON and STAFFORD, JJ.

Opinion filed February 25, 1903.

*Rape—Evidence—Instructions—Reading evidence to jury—
New trial—Newly discovered evidence—Character of—
Sufficiency.*

On the question of the genuineness of a letter, evidence that certain statements therein are false, is admissible, though such statements are merely incidental to the part relied upon as evidence.

It was not error to charge that all evidence in the case was "real" evidence to be considered and weighed by the jury.

That the respondent was not, at the time when the crime was committed, at the place where he claims to have been, may be considered as evidence of his guilt.

It is in the discretion of the trial Court to grant or deny a request of the jury to have certain evidence read; and if granted, it is sufficient if the Court complies with the request as made.

A new trial will not be granted on the newly discovered evidence of an apparently unreliable witness.

Nor will a new trial be granted, even in a criminal case, upon newly discovered evidence to impeach the general reputation for truth and veracity of one of the State's witnesses, when the impeaching and sustaining evidence are of about equal weight.

A supplemental petition for a new trial, filed by leave of this Court, is denied for insufficiency of the newly discovered evidence (*q. v.*) upon which it is predicated.

INFORMATION FOR RAPE. Plea, not guilty. Trial by jury at the June Term, 1902, Windsor County, *Haselton, J.*, presiding. Verdict and judgment, guilty. The respondent excepted. A petition and a supplemental petition for a new trial based on newly discovered evidence, were heard with the exceptions.

Gilbert A. Davis for the respondent.

H. H. Blanchard, State's Attorney, for the State.

TYLER, J. Information for rape upon a girl under sixteen years of age. The State introduced evidence tending to show the commission of the crime. The respondent denied the charge, and produced evidence tending to show that at the time alleged he was sick at a house three miles distant from the place where the crime was laid. He also introduced two letters, which purported to have been written by the prosecutrix, and which the respondent testified he received by mail while he was in prison, after a former trial of the case. They stated, in substance, that the writer was sorry the respondent was in prison; that she hoped he would not blame her for it; that he was not the man who assaulted her, but that it was a stranger who resembled him; that she told her grandmother,

with whom she lived, that it was the respondent, because her grandmother had threatened to whip her if she did not tell who it was, and that her father had made a like threat if she told her story differently; also that her grandmother had told her that, if the respondent got out of prison, he would kill her. These letters were in contradiction of her testimony, and it was a material question whether they were genuine, or were manufactured for the purpose of the defense. In rebuttal she denied having written the letters, and disclaimed all knowledge of them.

As bearing upon this question, the State's Attorney, subject to the respondent's exception, was permitted to inquire of the prosecutrix and of her father and grandmother whether the threats and statements mentioned in the letters were made to her, and the witnesses answered that they were not made.

I. The letters may have been genuine, written by the prosecutrix for the reasons assigned in them; or she may have written them, and through fear of or favor for the respondent, fabricated the story about the threats; or they may have been forged. These were questions for the jury. It was clearly competent for the State to prove in rebuttal that the threats were not made, in which case one of the other alternatives must have existed, for the prosecutrix could not have truthfully written about threats that had never been made. The respondent's counsel argues that the material parts of the letters were what related to the vital question in the case—the respondent's identity with the man whom the prosecutrix had charged with the crime; that the threats were not claimed by the respondent as evidence, and that they came into the case only as an incident. But the letters were put in by the respondent as evidence, and, while it is true that what was material to his defense was what they contained in respect to his

identity, the State claimed that they were not genuine, but forged. There had been a trial of the case prior to the appearance of the letters, in which it is presumable that the prosecutrix had charged the respondent with the crime, as she did in the last trial; and her evident purpose in writing the letters, if she wrote them, was to exonerate the respondent, and give reasons for having falsely accused him. If the reasons assigned never existed, the motive for making a false accusation never existed, and this bore upon the genuineness of the letters. The evidence objected to was properly admitted. Steph. Dig. Ev. Art. 9.

II. In argument the State's Attorney's assistant referred to certain evidence introduced by the State as "real evidence," and the respondent's counsel requested the Court to instruct the jury that there was no such legal classification, with which request the Court complied, and instructed them that all evidence in the case was real evidence; that nothing comes into a case except what is real evidence; but that there was no such classification as "real" or "unreal" evidence, and said: "All the evidence before you is real evidence, to be considered by you, and weighed for what it is worth in producing an effect upon your minds, one way or the other. Everything that is not real evidence is not evidence at all, and is kept out of the case." To this part of the charge the respondent excepted, but we think it contains no error. It was, in effect, that all the evidence that had been admitted was to be considered and weighed for what it was worth.

III. The part of the charge which is recited in the exceptions upon the subject of *alibi* was favorable to the respondent, and was a correct statement of the law: "In going along with a consideration of the case you may have occasion to consider the question of an *alibi* in another connection. That

is, if you find that the respondent was not at home that forenoon, * * * it does not necessarily follow that he committed this crime; it does not necessarily follow, if he was not at home, that he was where the testimony of the witnesses on the part of the State tends to show he was, and that he committed this crime. But, * * * if you find that this claimed *alibi* was false,—that is, that he was not at home that forenoon, as has been claimed by him,—if you find that is a false or fictitious defense, that is a circumstance you have a right to treat as evidence tending to show his guilt; but the weight to be given to it is wholly for you to determine.”

To the other part of the charge there was no exception, and we may assume that the jury were instructed that they must find beyond a reasonable doubt that the *alibi* was false and fabricated, and that the respondent was in fact at the place where the crime was committed, as alleged in the information. That the Court had previously given instructions upon the subject of *alibi*, is apparent from his introductory remark in the part quoted, that the jury might have occasion to consider the subject “in another connection.” If there was error in the part of the charge not recited, or in omission to charge, the respondent should have brought it upon the record. In the part recited no error appears.

IV. After the case had been given to the jury, they returned to the court-room, and asked to have the direct testimony of two witnesses read to them, and the request was granted. The respondent’s counsel requested that the cross-examination of the two witnesses be also read, which was refused. It was discretionary with the Court whether to grant or deny the jury’s request. It was sufficient that he complied with it as made. The respondent had no legal right to have more read than the jury requested.

There must be judgment upon the verdict, sentence, and execution thereof.

PETITION FOR NEW TRIAL.

This petition is based upon two grounds; 1st, that a newly discovered witness, Rider, will testify that he mailed a letter, written by the prosecutrix and addressed to the respondent, about the time the latter claims to have received the one in question; 2nd, newly discovered evidence to impeach the general reputation of Mrs. Fosby, the grandmother of the prosecutrix, for truth and veracity.

As the letter was placed in the hands of the respondent's counsel who defended him in the first trial, in March last, and as Mrs. Fosby had been an important witness in that trial, it would seem that all this evidence might, with reasonable diligence, have been discovered and used at the second trial. This is especially true in respect to Rider, in view of the facts that it is stated in the letter that it would be mailed by some person without the knowledge of the writer's father and grandmother, and that Rider was boarding at the house where, and at the time, the letter was claimed to have been written, so that he was obviously a person to be seen and inquired of at once in order to supply this important piece of evidence; yet it appears that his statement to the respondent's wife and his affidavit were not obtained until the August next after the June term when the case was last tried. It is true that he was in an adjoining county most of the time, but not beyond easy reach.

But, apart from all question of due diligence, the testimony of Rider is unreliable. In August, Mrs. Manning, the respondent's wife, obtained his signature to a writing which

stated that the prosecutrix requested him to mail a letter, and that he told her he would, and in September he made affidavit, on application of respondent's counsel, that upon the prosecutrix' requesting him to mail a letter one evening, he told her to put it in his coat pocket when she finished it; that he found it there the next morning, and mailed it, and that it was addressed to the respondent.

In a subsequent affidavit, taken by the State, Rider denied having mailed any letter for the prosecutrix, but says he saw her writing, and that she told him she was writing to her aunt about finding her a place to work. This is also, in substance, the affidavit of the prosecutrix.

We have carefully considered these affidavits and the statements made by Rider to Mrs. Manning and to others, and the circumstances in which they were made, and are of the opinion that any testimony that Rider might give in a new trial of the case would be of but little, if any, value.

A considerable amount of testimony has been taken by the respondent and the State bearing upon the question of Mrs. Fosby's reputation for truthfulness. The impeaching and the sustaining testimony are of about equal weight. Mrs. Fosby is evidently a poor and obscure person, with no decided reputation in this respect; besides, she testified on two trials of the case, and no attempt was made to impeach her.

While it is the rule, as stated in 1 Bish. Crim. Proced. § 1273, that new trials should be awarded more freely in criminal than in civil cases, here the newly discovered evidence is not so conclusive and decisive in its character as to raise a probability of a different result on another trial. *State v. Doherty*, 73 Vt. 389, 50 Atl. 1113.

Under a supplemental petition, which the respondent has been allowed to file, he presents the affidavits of Harry Dyer,

Alta Dyer and William McGibbon, which tend to show statements made by the prosecutrix out of court to the effect that the respondent did not commit the crime charged. The three affidavits are not in accordance with each other in respect to the conversations that led to the alleged statements nor in respect to the statements themselves. The prosecutrix, in her affidavit, denies that she made any of them; if made, it is remarkable that the affiants did not disclose them to the respondent's counsel, or to his family who lived four or five miles from them. On the contrary, though they all knew that these statements were in straight contradiction of what the prosecutrix had testified to on one trial of the case in the County Court, and knowing that she was going as a witness to the second trial, the testimony of the officer who took the prosecutrix away from Dyer's house to attend that trial tends to show that Mr. and Mrs. Dyer both denied that they knew anything about the case. They deny that they talked with the officer; but, on the whole, we think this testimony, in connection with that attached to the original petition, does not warrant the granting of a third trial.

Petition dismissed.

L. F. TERRILL v. F. P. TILLISON.

January Term, 1903.

Present: TYLER, MUNSON, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed February 25, 1903.

Promissory note—Consideration—Forged bond—Representations of payee's agent—Res gestae—Motion for verdict—Instructions.

A note procured by the representation that it was to discharge an obligation which the signer had assumed, but which in fact was to discharge a bond to which such signer's name had been forged, is without consideration.

One who entrusts a note to another with directions to procure a third person's signature thereto, makes such person his agent for that purpose; and such person's representations as to what the note is for are within the scope of his agency.

When the record does not disclose the grounds on which a motion for a verdict was based, an exception to the overruling of the motion will not be considered.

That the obligees of a forged bond accepted it in good faith and assumed obligations relying upon it, affords no consideration for a note fraudulently procured to discharge liability thereon.

A request to charge, which there is no evidence to support, is properly refused.

When one alternative of a request to charge is unsound, the whole may be disregarded.

GENERAL AND SPECIAL ASSUMPSIT. Pleas, the general issue and four special pleas in bar. Trial by jury at the September Term, 1902, Chittenden County, *Start, J.*, presiding. Verdict and judgment for the defendant. The plaintiff excepted.

L. F. Wilbur for the plaintiff.

The motion for a verdict should have prevailed, because if the note was obtained by fraud, there was no offer to rescind. *Matteson v. Holt*, 45 Vt. 336; *Safe Co. v. Lesdale*, 48 Vt. 83; *Downer v. Smith*, 32 Vt. 1; *Norton v. Gleason*, 61 Vt. 474; *Rubber Co. v. Adams*, 23 Pick. 256; Clark on Contracts, 291, 385; *Yeates v. Hines*, 24 Mo. App. 619; 1 Dan. Neg. Ins., 194.

This question is one of law. *Bassett v. Brown*, 105 Mass. 577; *Holbrook v. Burt*, 22 Pick. 546.

The refusal of the Court to charge that the burden was on the defendant to prove that a change had been made in the bond and to establish fraud, was error. *Beaman v. Russell*, 20 Vt. 205; *Boothly v. Stanly*, 34 Me. 515; *Russell v. Cook*, 3 Hill 54.

The defendant ratified the change and settled his liability by giving his note. *Forsyth v. Day*, 46 Me. 194; *National Bank v. Davis*, 100 Mass. 413; *Brigham v. Peters*, 1 Grey, 139; *Griggs v. Selden*, 58 Vt. 56; *National Bank v. Morgan*, 117 U. S. 96; *Freeman v. Cook*, 2 Exch. 658; *Blair v. Waite*, 69 N. Y. 116; *Canal Co. v. Hathaway*, 8 Wend. 483.

The plaintiff is not responsible for what George E. said to the defendant at the time the note was signed. *White v. Landon*, 30 Vt. 599; *Holbrook v. Burt*, 22 Pick. 554; *Walsh v. Insurance Co.*, 73 N. Y. 5; *Stainer v. Tysen*, 3 Hill, 279; Story on Agency, s. 127; *Insurance Co. v. Insurance Co.*, 4 Mo. 578.

The third and fourth requests should have been complied with. The plaintiff's good faith protects him. *Seman v. Seman*, 12 Wend. 381; *Bank v. Waring*, 2 San. Ch. 1.

V. A. Bullard and Elihu B. Taft for the defendant.

The testimony regarding the consideration of the note in question was proper, notwithstanding the words "value received" in the written contract. 1 Parsons on Bills, 175; *Smith v. Ide*, 3 Vt. 290; *Phelps v. Stewart*, 12 Vt. 256; *Patchin v. Swift*, 21 Vt. 292; *Academy v. Nelson*, 24 Vt. 189; *Perkins v. Adams*, 30 Vt. 230; *Allen v. Spafford*, 42 Vt. 116.

George E. was the agent of the plaintiff in obtaining this note, and what he said to induce the defendant to sign the note is evidence.

The Terrill-Whipple bond did not furnish a consideration for the note in suit. *Soules v. Soules*, 10 Vt. 236; *Tweed v. Martin*, 41 Mich. 216.

Nor is the receipt a consideration, since it was the discharge of no right held against the defendant. *Schroeder v. Frank*, 60 Md. 436; *Williams v. Nicholes*, 10 Gray 83; *Kircher v. Springer*, 4 Pa. Dis. Rep. 144. The defendant's retention of the receipt does not affect the question. *McCrane v. Hallack*, 30 Vt. 235; *Vail v. Strong*, 10 Vt. 457; *Gale v. Lincoln*, 11 Vt. 152; *Mattock v. Lyman*, 16 Vt. 113; *Hersey v. Barlow*, 23 Vt. 685; *Hill v. Pratt*, 29 Vt. 119.

An offer to rescind was not necessary, since it was a question of consideration. This is so if the question was one of fraud, alone. 2 Parsons on Bills, 521; *Wilbur v. Prior*, 67 Vt. 508.

WATSON, J. The execution of the note upon which the plaintiff seeks to recover was admitted by the defendant, but he claimed in defense that the note was procured by fraud and was without consideration. In support of this claim, and under exception by the plaintiff, the defendant was permitted to show that in the spring of 1897, the plaintiff, T. S. Whipple, and G. A. Terrill signed or indorsed notes for one George

E. Terrill, a son of the plaintiff, to the Howard National Bank of Burlington, to the amount of two thousand dollars, which they subsequently and before the execution of the note in question were obliged to pay; that before they would so sign or indorse any paper for George E., they required him to secure or indemnify them for so doing, whereupon George E. delivered to them a bond purporting to be signed by the defendant and five other obligors, for six thousand dollars, payable to the plaintiff, Whipple, and G. A. Terrill, conditioned that if the notes and papers which they were to indorse for said George E., not exceeding six thousand dollars, should be paid, then the obligation should be void, otherwise in force, and stating therein that it was understood and agreed that none of the signers of the bond should be held in an amount greater than one hundred dollars; that the body of the bond did not contain the names of any obligors, but that it had the names of what purported to be six signers at the bottom, and among them was the name of the defendant. The defendant's evidence further tended to show that neither the defendant nor any of the other of said apparent obligors ever signed said bond, but that their names had been cut off a bond running to said bank for four thousand dollars, which they had in fact signed for the benefit of said George E., and the same had been pasted to the bond first above mentioned; that after the plaintiff, Whipple, and G. A. Terrill had paid the paper which they had so signed to the bank, the plaintiff, seeking to get a settlement of the defendant's supposed liability on the bond for six thousand dollars, wrote the note in question and gave it to George E., telling him to get the defendant to sign it, but gave him no other instructions; and that when the defendant gave the note, he was informed by George E. that it was to discharge his liability on the said bond running to the bank, and he so sup-

posed, when in fact it was to discharge his liability on the said bond for six thousand dollars.

This evidence, if true, showed that the only consideration for the note was the defendant's liability on a bond which was never signed by him, nor by any of the obligors whose names were attached thereto, but that their names were cut off another bond which had been signed by them, and pasted to the paper on which was written the body of this bond, without their knowledge or consent. In these circumstances, thus attaching their names thereto was a forgery in law, the instrument was void, it could afford no consideration for the note in suit, and the evidence was properly received.

If this bond is a forgery, it was a fraud upon the defendant thus to procure from him the note in payment of any liability thereunder. The plaintiff made George E. his agent to get the defendant to sign the note, and it was within the scope of his agency, in so doing, to tell the defendant what the note was for. The plaintiff could not in reason suppose that the defendant would sign it without such information. The declarations and representations made by George E. to the defendant in that behalf to induce him to sign, were therefore within the scope of the agency, constituted a part of the *res gestae*, and were properly received in evidence. *Kingsley v. Fitts*, 51 Vt. 414; *Mason v. Gray*, 36 Vt. 308; *Limerick Bank v. Adams*, 70 Vt. 132, 40 Atl. 166.

At the close of the evidence the plaintiff moved for a verdict, and to the overruling of the motion the plaintiff excepted. He also requested the Court to instruct the jury to render their verdict for the plaintiff, and excepted to the Court's failure so to do. This request is but a repetition of the motion,—one asked for a verdict at the close of the evidence, and the other at the close of the arguments.

The record does not disclose the grounds upon which these motions were based, and the exceptions are therefore not considered. *German v. Bennington R. R. Co.*, 71 Vt. 70, 42 Atl. 972.

The third and fourth requests are based upon the contention that, even though the bond be a forgery, if such forgery was without the knowledge or procurement of the plaintiff, and if the plaintiff, Whipple, and G. A. Terrill took it in good faith, and, relying upon it, signed the notes to the bank, and have since paid them, and the note in suit was given by the defendant and received by the plaintiff in good faith in settlement of the defendant's liability on the bond, then the plaintiff was entitled to recover the amount of the note. But notwithstanding these parties thus acted in good faith, if the bond was originally a forgery, it remained so and afforded no consideration for the note.

The fifth request was to instruct the jury that George E. Terrill was the agent of the signers of the bond in procuring and delivering it to the plaintiff; and the sixth, that the burden of proving a change in the bond or of establishing fraud was on the defendant.

There was no evidence tending to show that George E. was acting as the agent of the signers of the bond, and therefore the fifth request was properly refused. And upon the evidence in the case the bond was either a genuine, valid bond, or it was a forgery. There was no evidence on either side that it had ever been changed. One alternative of the request being bad, the whole request could be disregarded. *Boyden, Admr. v. Fitchburg R. R. Co.*, 72 Vt. 89, 47 Atl. 409.

Judgment affirmed.

MARY G. BURTON v. JOHN M. PROVOST, et al.

January Term, 1903.

Present: TYLER, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed February 25, 1903.

Wills—Construction—Remainders.

A devise to a widow for life, which provides that at her death the "reversionary interest" shall belong to and be divided equally among the testator's daughters and their heirs, creates a vested remainder in the daughters.

APPEAL IN CHANCERY. Heard on the defendants' demurrers to the bill, at the December Term, 1902, Bennington County, *Munson*, Chancellor. Demurrers overruled, amended bill held sufficient, and decree for oratrix. The defendants appealed.

William R. Daley for the defendants.

The sixth clause of the Burton will creates a contingent and not a vested remainder in Burton's daughters. *Dickson v. Picket*, 10 Pick. 517; *Olney v. Hull*, 21 Pick. 311; *Hurlburd v. Emerson*, 16 Mass. 241; *Thompson v. Ludington*, 104 Mass. 193.

Batchelder & Bates for the oratrix.

The clause of the Burton will here in question creates a vested remainder in the testator's daughters. *Blake v. Stone*, 27 Vt. 475; *Gourley v. Woodbury*, 42 Vt. 395; *Weatherhead v. Stoddard*, 58 Vt. 623; *Jones v. Remele*, 63 Vt. 391; *In Re Tucker's Will*, 63 Vt. 104; *Gourley v. Woodbury*, 51 Vt. 37; *Decamp v. Hall*, 72 Vt. 483; *Avery v. Everett*, 110 N. Y. 317;

Ducker v. Burnham, 146 Ill. 9; *Shattuck v. Steadman*, 2 Pick. 468; *Goebel v. Wolff*, 10 Am. St. 464, and note; *Pike v. Stevenson*, 99 Mass. 188; *Drugley v. Drugley*, 5 Mass. 535; *Weston v. Foster*, 7 Met. 297; *White v. Curtis*, 12 Gray, 54; *Wright v. Shaw*, 5 Cush. 56; *Hill v. Bacon*, 106 Mass. 578; *Kimball v. Tilton*, 118 Mass. 311.

HASELTON, J. Elias B. Burton, late of Manchester, died testate, leaving surviving him a widow and three daughters, Agnes, Ella and Fanny, two of whom were married women with children, the third being a widow with no children. The only question in this case is as to the construction of a clause in the will of Elias B. Burton.

The fifth and sixth clauses in said will read as follows: "I also will, devise and bequeath to her (his wife) the use and occupancy, during her natural life, of the house, buildings and premises belonging to me and occupied by me as a homestead, situated in the village of Manchester, and in the case of destruction by fire of any of the buildings or property, any insurance that may be effected upon said property shall belong and be paid to my said wife, Mary G., for her use and benefit.

I will and devise all my money claims not hereinbefore referred to, meaning all notes, mortgages, debentures, bank stock, evidences of indebtedness of every kind and choses in action, I may have at my death, should be held by my executors in trust to keep the same secure and remunerative, and to pay the interest and income arising therefrom to my said wife, Mary Gerrans, during her natural life for her own use and benefit, and at her death the principal remaining of said trust, as well as the reversionary interest in said homestead and premises, to belong to and be divided equally among my said three daughters and their heirs."

The precise question raised is whether the interest in the homestead and premises devised to the daughters is a vested or a contingent remainder. Under the authorities in this State it is clear that the remainder vested in the daughters upon the death of the testator, the enjoyment of the vested estate being postponed. *In Re Tucker's Will*, 63 Vt. 104, 21 Atl. 272; *Jones v. Knappen*, 63 Vt. 391, 22 Atl. 630, and cases there cited.

The rule never to be lost sight of in determining whether a devised estate is vested or contingent is well stated in each of the above named cases. "No estate will be held contingent unless very decided terms are used in the will, or it is necessary to so hold in order to carry out the other provisions or implications of the will." *In Re Tucker's Will*. "Unless the language of the testator, when applied to the circumstances of the case, clearly indicates a contrary intention, the law favors the vesting of remainders on the death of the testators when the will becomes operative. Such is presumed to be the testator's intention, unless the contrary appears." *Jones v. Knappen*.

It is impossible to reconcile all the relevant decisions in all jurisdictions, but the conclusion here reached is in accordance with the general trend of the reported cases. For a very full and satisfactory review of American cases on the question under consideration, reference is made to a note to *Goebel v. Wolff*, (N. Y.) 10 Am. St. Rep. 464.

The clause relating to the remainder, called in the will the "revisionary interest," is of the same effect as though it read: "I give one-third of the remainder to my daughter Agnes and her heirs, one-third to my daughter Ella and her heirs, and one-third to my daughter Fanny and her heirs." Any apparent

obscurity is obviously due to an effort towards conciseness of expression.

Decree affirmed, and cause remanded.

STATE v. HENRY BARRELL.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed February 25, 1903.

Information—Amendment of.

A State's Attorney may, by leave of Court, amend an information filed by his predecessor in office.

An information is not required to be upon the State's Attorney's oath of office.

INFORMATION FOR LARCENY. At the December Term, 1902, Windsor County, Rowell, C. J., presiding, the State's Attorney asked leave to amend the information in matters of substance, to which the respondent objected. The objection was overruled *pro forma*, the amendment was allowed, and the information was amended accordingly. Thereupon, the case was tried by jury on a plea of not guilty, and a verdict of guilty rendered. The respondent moved in arrest of judgment for the insufficiency of the information, which motion was overruled, and judgment rendered on the verdict. The respondent excepted.

Gilbert A. Davis for the respondent.

The Court had no power to allow the information to be amended in a matter of substance. The information was under the oath of a former State's Attorney. *State v. Wheeler*, 64 Vt. 569; *State v. Brown*, 72 Vt. 410; 1 Bish. Crim. Pro., s. 325; *Com. v. Rodes*, 1 Dana 595; *State v. Dover*, 9 N. H. 468; Hughes' Crim. Law, s. 446.

The Court having no power to permit an amendment, the trial must have been on the original information, which was insufficient, and judgment should have been arrested. *Garcia v. State*, 26 Tex. 209.

Herbert H. Blanchard, State's Attorney, for the State.

An information of a State's Attorney can be amended by his successor both in form and substance. The personality of the State's Attorney is not considered; he acts as a public officer, and the office is continuous. *State v. Meacham*, 67 Vt. 709; *State v. White*, 64 Vt. 372; *Atty. Gen. v. Henderson*, 3 Anst. 714; *People v. Hensslee*, 48 Mich. 49; *Rex v. Wilkes*, 4 Bur. 2527, 2566-2572; 1 Chit. Crim. Law, 844-869; 15 Richardson (So. Car.) 39.

WATSON, J. At the December Term, 1902, of the County Court in Windsor County, the State's Attorney moved to amend the information which had been filed at the preceding term of court by his predecessor in office. The respondent objected thereto on the ground that, as the present State's Attorney did not file the information he could not amend it. The objection was overruled *pro forma*, and the amendments were allowed and made, to which the respondent excepted. The case was then tried by jury, and a verdict of guilty rendered. The respondent moved in arrest of judgment for the insufficiency of the information. This motion was overruled, the

information adjudged sufficient, and judgment rendered on the verdict; to which respondent excepted.

That an information may be amended both in matters of form and in matters of substance is well settled, (*State v. White*, 64 Vt. 372, 24 Atl. 250; *State v. Hubbard*, 71 Vt. 405, 45 Atl. 75); but it is contended that leave for that purpose can be granted only to the State's Attorney who filed the information, because it is said to be under his oath of office; and that, his term of office having expired, the legal and proper course for the present State's Attorney, if the information was defective in substance, was to enter a *nolle prosequi*, and then file a new information.

In England, at common law, the Attorney General was the sole judge of what public misdemeanors he would prosecute, and he could file an information against any one whom he thought proper to select, without oath or motion, and without any opportunity for the accused to show cause against the proceeding; and the conduct, continuance, suspension, and the dropping the prosecution were left entirely to his discretion. Chit. Cr. L. 345; 4 Black. Com. 309.

In this State there is no law requiring a State's Attorney to make oath to an information filed by him. He is required to take the oath of office prescribed in the Constitution; but it was held in *State v. Sickle*, Brayton, 132, that it was not necessary for him to state in an information that he informs under his oath of office. The oath of office under which he acts is for the faithful performance of his duties as such officer, but in no sense is it an oath to the truth of the allegations set forth in an information filed *ex-officio* by him, and it constitutes no obstacle in the way of amendments by any State's Attorney who may have the matter in charge.

Criminal informations are in the name of the State, and only the allegations of the State's Attorney who exhibits them, and they are said by Mr. Chitty (1 Chit. Cr. L. 841), to be "analogous to declarations for the redress of a personal injury, except that the latter are at the suit of a subject for the satisfaction of a private wrong," and the former are "for the punishment of offences affecting the interests of the public." Lord Comyn says (Com. Dig. Tit. Information): "An information is a declaration of the charge or offense against any one at the suit of the King." And in *Rex v. Wilkes*, 4 Burr. 2553, Lord Mansfield says: "An information for a misdemeanor is the King's suit. The title of the cause is 'The King against the defendant.' * * * As a subject sues by attorney, so does the King, with a little variation of form for decency." See, also, *State v. White*, above cited.

It appears from *Rex v. Wilkes* that generally in England informations for misdemeanors of a public character were brought by the Attorney General as an official right, but in case of his absence from the realm, disqualification, disability from sickness, or if the office of Attorney General was vacant, the whole business and authority devolved upon the Solicitor General, another of the King's counsel, and, except in the difference of his description, the form of the information was the same. In the case last cited, the office of Attorney General being vacant, the information was exhibited by the Solicitor General, and before the respondent pleaded, the Solicitor General was made Attorney General, and in that capacity brought into Court the information he had filed as Solicitor General. Desiring to amend the information, he then directed one of the clerks in court for the Crown to apply to a judge for such an order. On notice to the other side, and upon hearing before Lord Mansfield at Chambers, the Crown being represented by

the said clerk, and the respondent by his solicitor and his clerk in court, it was ordered: "Upon hearing the clerks in court on both sides, I do order that the information in this cause be amended," etc. And upon writ of error, it was held that the information was properly filed by the Solicitor General, and that in thus permitting its amendment there was no error. Although the exact question before us was not involved in that case,—the Attorney General being the same person who as Solicitor General had filed the information,—yet the course therein pursued with the discussion and the holdings of the Court, is of great value; for it shows that in permitting the attorney for the Crown to make such amendment, the fact that when he filed the information he was acting under some other official designation was immaterial. Whichever designation, he was the attorney for the Crown in that case, and could be granted leave to make the amendment required, and a clerk for the Crown could make the motion, and obtain the leave.

The case of *Attorney General v. Henderson*, 3 Anstr. 714, is very much in point. There the Attorney General filed the information and the Solicitor General was permitted to amend it by adding another count.

In Michigan the Assistant Prosecuting Attorney was authorized to perform only such duties as might be required of him by the Prosecuting Attorney, yet it was held in *People v. Henssler*, 48 Mich. 49; 11 N. W. 804, that in the absence of the Prosecuting Attorney, the person who in his stead appeared for the people (in that case the Assistant Prosecuting Attorney) must, from necessity, have the power, with the permission of the Court, to make amendments to the information.

We do not find that this question has before been passed upon by this Court. But in *State v. Meacham*, 67 Vt. 707,

32 Atl. 494, where the question was upon the sufficiency of the information upon demurrer, it is said in the opinion, *per curiam*, that owing to the views of the judges, no decision could be made regarding that question, but that inasmuch as the information of a State's Attorney could be amended by his successor in office, both in form and in substance, the judgment would be reversed *pro forma*, and the case remanded to the County Court to be proceeded with.

Although it does not appear that the question of a State's Attorney's amending an information filed by his predecessor in office was before the Court, the disposition of the case is significant in showing how the law regarding it was then understood.

Upon principle and authority we think a State's Attorney may be permitted to amend an information filed by his predecessor in office; for the State is acting, and whether it is represented by the same attorney throughout the case, or by different ones in the same office, the law regarding amendments is the same.

The motion in arrest of judgment is based upon the information as it was before the amendments were made. No claim is made that it is insufficient as amended.

Judgment that there is no error in the proceedings of the County Court, and that the respondent take nothing by his exceptions. Let sentence be pronounced, and execution done.

. A. M. ASELTINE v. WILLIAM PERRY.

January Term, 1903.

Present: TYLER, START, WATSON and HASELTON, JJ.

Opinion filed February 25, 1903.

Common counts—Specification—Limitation of right of recovery.

Though a specification is no part of the declaration in respect to subsequent pleadings, it circumscribes the scope of the evidence and the right of recovery.

A specification can be treated as amended, when not amended in terms, only when the course of the trial has been such as to permit it to be so treated.

GENERAL ASSUMPSIT. Pleas, the general issue and payment. Heard on the report of a referee, at the September Term, 1902, Franklin County, *Munson*, J., presiding. Judgment for the defendant. The plaintiff excepted.

Elmer Johnson for the plaintiff.

This is not a suit upon the notes, but an action for money lent and paid out. The notes furnished evidence that the maker has received from the payee a sum of money which he promises to pay. *Chase & Grew v. Burnham & Dow*, 13 Vt. 448; 14 Am. & Eng. Ency. Pl. & Pr. 566; *Lapham v. Briggs*, 27 Vt. 27.

The purpose of a specification is not to tell what kind of evidence will be offered, but to define the ground of recovery. *Hicks v. Cottrell*, 25 Vt. 80; *Greenwood v. Smith*, 45 Vt. 38.

An attorney may claim a recovery upon one ground only, yet if the evidence discloses a different ground of recovery

suited to the declaration, he is entitled to judgment. *Bates & Son v. Michael*, 56 Vt. 49.

Emmet McFeeters for the defendant.

The notes having been received in payment of the premium, no suit can be maintained for the premium. *Hutchins v. Olcott*, 4 Vt. 549; *Torrey v. Baxter*, 13 Vt. 452; *Farr v. Stevens*, 26 Vt. 299; *Collamer v. Landon*, 29 Vt. 32; *Waite v. Brewster*, 31 Vt. 516; *Wemet v. Lime Co.*, 46 Vt. 460. The plaintiff's right of recovery is limited by his specification. *Bank v. Lyman*, 20 Vt. 666.

HASELTON, J. The plaintiff was a life insurance agent. The defendant, through the plaintiff's agency, made application for insurance on his life; and the plaintiff's principal, in accordance with said application, issued to the defendant a policy of life insurance, and delivered the same to the plaintiff for the defendant. At the time of said application the defendant executed and delivered to the plaintiff two notes, the consideration for which was an agreement that the agent should pay the company, for the insured, the amount of the first premium, which was \$26.20. This the plaintiff did, and held the insurance policy and the notes. In these circumstances, the contract of insurance between the company and the defendant was a completed one, and the notes were valid. *Porter v. Life Insurance Co.*, 70 Vt. 504, 41 Atl. 970.

After the maturity of the first note, but before the maturity of the second, the agent brought suit against the defendant in assumpsit, declaring in the common counts only. By his specification he sought to recover the premium as such. He introduced the notes in evidence, but only for the purpose

of sustaining his specification. On the trial, which was had before a referee, the plaintiff disclaimed any right to recover upon the above mentioned notes, but claimed to recover in accordance with his specification only.

The plaintiff's claim and specification being what they were, the Court properly rendered judgment for the defendant on the referee's report. The case is one in which the plaintiff voluntarily limited his right of recovery by his specification and the position taken by him on trial. *Johnson v. Cate*, 75 Vt. 100, 53 Atl. 329. While a specification is no part of the declaration in respect to subsequent pleadings, it nevertheless circumscribes the scope of the evidence and the plaintiff's right of recovery. *Bank v. Lyman*, 20 Vt. 666; *Lapham v. Briggs*, 27 Vt. 27. It may be amended as the case develops, and, though not amended in terms, it may be treated as having been amended, if the course of the trial has been such as to permit it to be so treated. *Greenwood v. Smith*, 45 Vt. 37; *Bates v. Quinn*, 56 Vt. 49. Here the specification was not expressly amended; and the claim of the plaintiff and the course of the trial were such that it cannot be treated as having been amended by implication.

It is obvious from the record that the plaintiff would have had judgment below for the amount of the matured note, but for the erroneous position which he took on trial. His error cannot be attributed to the Court.

Judgment affirmed.

OUGHTNEY JANGRAW v. MARY MEE.

January Term, 1903.

Present: TYLER, MUNSON, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed February 25, 1903.

*Adverse possession—Notice of claim—Question for jury—
Motion to set aside verdict.*

When possession is of such a character as to indicate to the owner that it is exercised as a matter of right, no notice of the possessor's claim is required to make it adverse.

Whether or not the possession is of this character is a question for the jury.

A motion to set aside a verdict as against the weight of evidence is addressed to the discretion of the trial Court, and its action thereon is conclusive.

EJECTMENT. Plea, the general issue with notice of special matter. Trial by jury at the March Term, 1902, Washington County, *Start*, J., presiding. Verdict for the defendant. Motion to set aside the verdict overruled, and judgment on verdict. The plaintiff excepted.

George W. Wing and *John G. Wing* for the plaintiff.

An inspection of all the evidence in the case shows that the verdict was against the weight of evidence, and the same should have been set aside.

The defendant can not stand upon adverse possession, because it was permissive. *Pray v. Pierce*, 7 Mass. 381; *Bartlett v. Judd*, 21 N. Y. 200; *Henry v. Huff*, 143 Pa. St. 548.

That possession must be exclusive as well as hostile. *Pulaski County v. State*, 41 Ark. 118; *Tracy v. Railroad Co.*, 39 Conn. 382; *Hill v. Waldrop*, 57 Ga. 134; *Turney v. Chamber-*

lin, 15 Ill. 271; *Law v. Smith*, 4 Ind. 56; *Hempstead v. Hoffman*, 84 Ia. 398; *Roberts v. Richards*, 84 Me. 1; *Burks v. Adams*, 80 Mo. 504.

T. R. Gordon and *F. L. Laird* for the defendant.

This Court will not disturb the verdict, for there was evidence to support it. *Hill v. New Haven*, 37 Vt. 512; *Weeks v. Barron*, 38 Vt. 420; *Mullin v. Rowell*, 56 Vt. 301.

The character of the defendant's possession was a question for the jury. Cyc. 1153, 1159.

WATSON, J. This action was tried by jury resulting in a verdict for the defendant. Before judgment on verdict, the plaintiff moved to set aside the verdict on the grounds, (1) that it was against the weight of evidence, contrary thereto, and not in accordance therewith; (2) that the north-easterly line of the plaintiff,—the line in dispute,—was conceded to start from a certain cedar post marking the westerly corner of defendant's land; and (3) that the evidence in the case had a tendency to show that the disputed premises had been used in common by the parties, and that the defendant's occupation had been by the plaintiff's permission, and not openly, notoriously, and exclusively adverse to him under a claim of right. The only question before us is on exception to the overruling of this motion.

The defense was placed upon the ground of title in the defendant both by record and by prescription.

The plaintiff claimed and the defendant conceded that the north-easterly line of plaintiff's lot,—the line in dispute,—started from a certain cedar post marking the westerly corner of defendant's land. The defendant's evidence tended to show that from the year 1875, she and her husband owned

and occupied the premises now owned by her adjoining the plaintiff's land until the husband's death about ten years ago, and that since then she has been the owner thereof and has occupied them in person or by her tenants; that when the defendant and her husband bought the place in 1875, the line between their land and the land now owned by the plaintiff was indicated on Loomis street by the cedar post, and that there was also a "line-board" on the barn; and that in 1879, and as late as 1887 and 1888, a common board fence was there on this line or portions of it. It is to this line thus indicated that the defendant claims to own. Her evidence tended to show occupancy of the disputed premises and to this line, by herself and husband until his death, and by herself or her tenants since; also uninterrupted, exclusive, open, notorious possession and acts of ownership for more than fifteen years exercised by them; and that the plaintiff never made any objection thereto, nor in acts or words made any claim of right in himself until about four years ago, since which time both the plaintiff and the defendant have claimed to own them, each endeavoring to assert his or her rights therein, which have been constantly disputed and resisted by the other.

It is said by the plaintiff that no notice of any kind of defendant's claim was given to him, and that the defendant does not claim that she ever said anything to him, or made any claim to the premises in question; also that the acts of the defendant with reference to the disputed premises are consistent with the claim of the plaintiff that the defendant's use of the same was by permission of the plaintiff, and not hostile, adverse, and exclusive.

It was not necessary for the defendant to show that she gave the plaintiff notice of her claim in words. It was sufficient if her occupancy and use were exclusive, open and no-

torious, and of such a character as would indicate to the plaintiff that she was exercising it as a matter of right. The evidence tended so to show, and it was for the jury to determine. *Willey v. Hunter*, 57 Vt. 479; *Plimpton v. Converse*, 44 Vt. 158; *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 695.

The only question, then, being whether the verdict was against the weight of evidence, the motion was addressed to the discretion of the trial Court, and its action thereon is conclusive. *Sowles v. Carr*, 69 Vt. 414, 38 Atl. 77.

Judgment affirmed.

LOUISE DAVIS v. ALBERT STREETER.

May Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed February 25, 1903.

Common counts—Special contract—Abandonment—Quantum meruit—Improper remarks by counsel—Motion for judgment non obstante.

One cannot except to hearsay testimony brought out by himself on cross-examination.

Improper comments of counsel which are peculiarly within the province of the trial Court to deal with, do not afford grounds for reversal.

A judgment *non obstante* will not be rendered for a defendant,—at least not where the issues are as they were here.

Services rendered under a special contract which one is forced by the other party to abandon, may be recovered for under the common counts.

One forced by the other party to abandon a special contract is excused from demanding performance before bringing suit.

GENERAL ASSUMPSIT. Pleas, the general issue and payment. Trial by jury at the March Term, 1901, Chittenden County, *Start*, J., presiding. Verdict for the plaintiff. Defendant's motion for judgment *non obstante* overruled. Judgment on verdict. The defendant excepted.

L. F. Wilbur and *Cushman & Sherman* for the defendant.

The plaintiff's services were rendered under a special contract, and her action must be on the contract. *Camp v. Barker*, 21 Vt. 469; *Curtis v. Smith*, 48 Vt. 116.

The testimony of Mary Gokey turned out on cross-examination to be hearsay. It was not withdrawn or stricken off. It was seasonably excepted to. The remark of plaintiff's counsel was improper. It was not withdrawn or dealt with by the Court. *Machine Co. v. Holden*, 73 Vt. 403; *Magoon v. Railroad Co.*, 67 Vt. 199; *Bullard v. Railroad Co.*, 64 N. H. 27.

The defendant's motion for a judgment notwithstanding the verdict should have been granted. *Gage v. Barnes*, 11 Vt. 195; *Hackett v. Hewett*, 57 Vt. 442.

There was no evidence that the plaintiff ever demanded a deed of any part of the defendant's farm or property. *Graham v. Est. of Chandler*, 38 Vt. 559.

M. G. Leary and *V. A. Bullard* for the plaintiff.

When the defendant forced the plaintiff to leave his premises, she had the right to call the special contract at an end and to recover for her services in an action of general assumpsit. *Stone v. Stone*, 43 Vt. 180; *Sherman v. Transportation Co.*, 31 Vt. 162; *Derby v. Johnson*, 21 Vt. 17; *Graham v.*

Chandler's Est. 38 Vt. 559; *Wilkins v. Stevens*, 8 Vt. 214; *Wainwright v. Straw*, 15 Vt. 215; *Stevens v. Talcott*, 11 Vt. 25; *Mattocks v. Lyman*, 16 Vt. 113, 18 Vt. 98.

The objectionable testimony of Mary Gokey was brought out by the defendant in cross-examination and should not prejudice the plaintiff.

The remark by plaintiff's counsel was not of such a character as to demand special attention. *Machine Co. v. Holden*. 73 Vt. 403; *Magoon v. Railroad Co.*, 67 Vt. 177; 2 Ency. Pl. & Pr. 630, note 4; Note to *McDonald v. People*, 9 Am. St. Rep. 569.

A motion for judgment *non obstante* will not be granted to the defendant. 2 Bouvier's Law Dict. 14; 1 Chit. Pl. 688, and cases cited.

HASELTON, J. This was an action of general assumpsit. The plaintiff was a widow with two children, and the defendant was a single man and owned a farm in Bolton upon which he lived. A transcript of the entire case was made a part of the exceptions for the purpose of showing the claims of the parties and the tendency of the evidence.

The plaintiff claimed, and there was evidence tending to show, that at some time in the fall of 1891, she went to work for the defendant, at his house, under an agreement with the defendant, to the effect, that, if she would do so, and live and work at his house, and help about paying for the farm, he would will or deed her a part of the farm, and board her children and give them a home, and would marry her; that from a time in the fall of 1891 until May, 1901, she was at the defendant's house, working faithfully for him, except during several short intervals when she was away from his house on account of his ill-treatment of herself and her children; that

after each of these intervals she returned to the defendant's service upon his persuasion; that her services to the defendant were performed in reliance upon the agreement referred to above; but that about May 22, 1901, by reason of the defendant's ill-treatment of her, and his refusal to support or have in his house one of said minor children, and his refusal to permit her to carry out the contract on her part or to remain upon his premises, she abandoned the defendant's house and employment, and never returned. In short, the plaintiff claimed, and there was evidence tending to show, that the defendant compelled the plaintiff to abandon such contract.

The defendant's testimony tended to show that the plaintiff did not work for him under any such agreement as the plaintiff claimed to have existed; but his claim was, and the testimony on his part tended to show, that the plaintiff worked for him during the time to which her claim for recovery related, or during the same time substantially, under an agreement by which he was to pay her \$1.00 a week, and board her children and give them a home; that he had fulfilled the contract on his part, settling with her from time to time, and making a final settlement; that he did not in any way abuse her or her children and that she left his service because she chose to leave it.

The plaintiff improved as a witness one May Gokey, who stated, on cross-examination by the defendant, that the defendant, on one occasion, kicked the plaintiff and dragged her out of the house. The record then proceeds:

Q. "What Streeter told you this? A. Archie Streeter. A cousin to Albert as far as I know.

By the Court: This testimony is not admissible."

To this testimony the defendant excepted. The exception, however, cannot be sustained, the defendant himself hav-

ing brought out this hearsay evidence, and its inadmissibility having been promptly declared by the Court.

In the course of the cross-examination of the defendant by the plaintiff's counsel, the cross-examination counsel said to the witness: "You are pretty willing to swear to anything." The defendant objected to what was so said, and asked to have it spread upon the record and to be allowed an exception. The request was granted, and the exception allowed. The plaintiff's counsel then said: "Spread it upon the record." To this remark the defendant asked for an exception, which was allowed.

A review of the case shows clearly that the remark, "You are pretty willing to swear to anything," was a comment upon testimony which the defendant had given, and could not have been understood as a statement or suggestion of matter foreign to the evidence. Yet the remark, not being made in argument but during the introduction of evidence, was irregular and improper. The irregularity and impropriety were, however, peculiarly for the trial Court to judge of and to deal with, in view not only of what was said, but also of the whole previous course of the trial, and of the manner of both the witness and the examiner. The testimony of the plaintiff and that of the defendant, concerning matters about which both must have known, were so irreconcilable that, in the regular course of argument to the jury, counsel for either party would have been warranted in claiming that the other party had been testifying in disregard of the truth. *State v. Warner*, 69 Vt. 30, 37 Atl. 246. It cannot reasonably be conceived by this Court that, after this case had been duly argued and submitted to the jury, the deliberations of that body were influenced by either of the remarks to which exception was taken. They constituted an

incident of the trial which should have been avoided, but there was not reversible error in connection therewith.

The various aspects of the case, as presented by the evidence, were submitted to the jury in a charge to which no exceptions were taken, and the jury returned a verdict for the plaintiff. After the verdict was returned, the defendant moved for judgment in his favor *non obstante veredicto*, on the ground that the entire claim of the plaintiff for services was under special contract or contracts not declared upon. This motion was overruled, and the defendant excepted.

In any view of the case the motion was properly overruled. In this jurisdiction a judgment *non obstante* will not be entered in favor of the defendant, at least not where the issues are as they were in this case. *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652; *Bradley Fertilizer Co. v. Caswell*, 65 Vt. 231, 26 Atl. 956; *French v. Steele*, 14 Vt. 479; *Stoughton v. Mott*, 15 Vt. 162. In *Hackett v. Hewett*, 57 Vt. 442, 52 Am. Rep. 132, judgment for the defendant was rendered on what was called a motion for judgment notwithstanding the verdict; but, as is pointed out in *Trow v. Thomas*, above cited, the motion on which judgment was rendered in the Hackett case was in reality a motion in arrest of judgment on the ground that it appeared by the writ and declaration that the plaintiff had no cause of action. What was said in this regard in *Gage v. Barnes*, 11 Vt. 195, was outside of the question under consideration, and the pleadings in that case were entirely different from those in the case at bar.

However, at the beginning of the plaintiff's testimony, evidence was admitted under objection and exception which fairly presents the question whether there was any evidence on the part of the plaintiff tending to support a recovery under the common counts. Upon consideration of this question, it is

held that the evidence hereinbefore referred to tending to show that the plaintiff rendered services to the defendant under a special contract which the defendant forced her to abandon, was evidence tending to support a *quantum meruit* recovery under the common count for work, labor, care and diligence of the plaintiff done and performed about the business of the defendant, and for the defendant, and at his request. *Stone v. Stone*, 43 Vt. 180; *Sherman v. Champlain Transportation Co.*, 31 Vt. 162; *Derby v. Johnson*, 21 Vt. 17; *Mattocks v. Lyman*, 16 Vt. 113; *Chamberlin v. Scott*, 33 Vt. 80. In so far as the evidence had a tendency to show that the defendant compelled the plaintiff to abandon further performance on her part, under the special contract, it tended to excuse the plaintiff from demanding performance thereunder on the part of the defendant before she instituted this action. The cases cited by the defendant as inconsistent with the view here taken are readily distinguishable. The cases so cited are *Myrick v. Slason*, 19 Vt. 121; *Camp v. Barker*, 21 Vt. 469, and *Curtis v. Smith*, 48 Vt. 116.

The trial Court rendered judgment for the plaintiff, and that judgment is

Affirmed.

CHILSON C. FAIRBANKS, et al. v. TOWN OF ROCKINGHAM.

January Term, 1903.

Present: MUNSON, STARR, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed February 25, 1903.

Highways—Change of grade—Damages—V. S. 3358.

A change in the grade of a highway entitles an abutting owner to damages only when it exceeds three feet, and then only for the injury caused by such excess.

APPEAL IN CHANCERY. Heard on the report of a special master and the defendant's exception thereto, at the September Term, 1902, Windham County, *Tyler*, Chancellor. Defendant's exception overruled, and decree for certain of the orators for the damages caused by the change of grade in the highway in question in excess of three feet. The orators appealed. The defendant appealed on the question of the master's jurisdiction.

H. D. Ryder and *Clarke C. Fitts* for the orators.

The jurisdiction of this Court was settled by the decision in this case as reported in 73 Vt. 124; and this decision will not be disturbed. *Sherman v. Organ Co.*, 69 Vt. 355.

The orators should be allowed damages for the first three feet of change in the grade of the highway. V. S. 3358. The statute should be construed liberally to the abutter. *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Nashville v. Nicoll*, 3 Baxter (Tenn.) 338; Note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 832.

C. H. Williams and *Bolles & Bolles* for the defendant.

The town had the right to change the grade of this highway to the extent of three feet; the chancellor limited the orators' recovery to damages caused by the change in excess of three feet; this Court should affirm such decree as being an equitable adjustment based upon the master's report.

HASELTON, J. This case has once before been in this Court, and the jurisdiction of the Court of Chancery, arising from special facts, was then determined. See this case, 73 Vt. 124, 50 Atl. 802.

The only question now before the Court is as to the construction of the phrase "such alteration" as used in V. S. 3358, relating to the grading of highways. That section and the preceding one read as follows:

"Sec. 3357. A selectman or road commissioner shall not alter a highway, by cutting down or raising the road-bed in front of a dwelling house or other building standing upon the line of said highway, more than three feet, without first giving notice to the owners thereof, of a time when the selectmen will examine the premises, hear them upon the question of making such alteration and damages by reason of such alteration, at which time the selectmen shall attend and hear such owners, if they desire to be heard.

Sec. 3358. If the selectmen are of opinion that the public good, or the necessity or convenience of individuals requires that such road-bed be altered by lowering or raising the same more than three feet, they may order such alteration to be made, and if they are of opinion that such owners will sustain damage by reason of such alteration they shall determine and award the amount thereof to the owners respectively, taking into account, by way of offset thereto, such special benefit, if any, to such owners as shall accrue to them by reason of such alteration."

It may be observed that an alteration of a highway implies, as a general rule, a change in the course or width of the highway. A mere change in the grade of the road-bed is not ordinarily regarded as an alteration. *Harrison v. Milwaukee*, 51 Wis. 645; *Bigelow v. Worcester*, 169 Mass. 390, 48 N. E. 1; *Collendar v. Marsh*, 1 Pick. 415. This rule seems to have been recognized in this State in *Phelps v. Gilman*, 22 Vt. 38, and in *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84.

In 1881, the case of *Penniman v. Town of St. Johnsbury*, 54 Vt. 306, was before this Court. The trustees of the village of St. Johnsbury had, to the extent of about three feet and six inches, raised the grade of a highway opposite Penniman's house, and Penniman petitioned the County Court to appoint commissioners to appraise damages. The case was, however, disposed of on grounds which did not touch the question whether this change of grade constituted an alteration of the highway. On this point the Court say: "It is unnecessary ** to decide whether such a change in the grade as was made would entitle the landowner to additional compensation or not. If such a change would be regarded as an alteration, there was no such alteration made by the selectmen as gives the petitioner the right to demand the appointment of commissioners." Thereafter, in 1884, the statute in question was enacted, and it is evident that, so far as concerns the grade of a highway opposite a building standing thereon, a change of not more than three feet is regarded by the statute as in the nature of ordinary highway repairs, and not as an alteration of the highway; and that, in the changing of such grade, an alteration in the sense of the statute begins when and only when, the lowering or raising of a road-bed exceeds three feet. To hold otherwise would be to depart from familiar and salutary rules applicable to the construction of statutes.

The statute in question read in connection with the highway law as a whole does not require or warrant a holding to the effect that, where the road-bed of a highway opposite a building is raised or lowered three feet and no more, an abutting owner is entitled to no compensation, and that where the grade of the road-bed is changed, say three feet and one inch, an abutting owner is entitled to compensation for damages resulting from the entire change of grade. Damages, in such circumstances, resulting from a change of grade to the extent of three feet, are to be treated as having been taken into consideration in fixing the compensation allowed to abutting owners upon the original laying out of the highway. A change of grade to the extent of three feet, made for the improvement of a highway, is considered to be made in the exercise of a public right already acquired and paid for.

Decree affirmed, and cause remanded.

LYNDON SAVINGS BANK v. INTERNATIONAL COMPANY, G. H.
PROUTY, O. C. MILLER and H. E. FOLSOM.

October Term, 1902.

Present: TYLER, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed February 25, 1903.

Promissory notes—Relation of signer—Rule 13—By-law of corporation—Evidence—Question for jury.

One whose signature appears upon a promissory note, and who is sued as a joint maker, may show that he did not sign in that capacity, without notice under County Court Rule 13.

A corporation, which issues its note and receives the avails thereof, cannot defend on the ground that the note was not approved as required by its by-law, in an action thereon by one without notice of such by-law.

The relation which one assumes by placing his signature on a note after its execution is a question for the jury.

One who, after its execution, puts his signature in blank upon the back of a promissory note to which he was not before a party, assumes, *prima facie*, the obligation of a maker, but the real obligation assumed by him may be shown by parol.

Whether the holder of a note acted in good faith toward certain of the signers, and, if not, whether such signers were thereby damaged, are questions for the jury.

That the maker of a note requested others whose names appear thereon to sign may be inferred from the circumstances surrounding the transaction.

SPECIAL ASSUMPSIT. The pleadings are stated in the opinion. Trial by jury at the December Term, 1901, Caledonia County, *Munson J.*, presiding. At the close of the evidence each party moved for a verdict. Plaintiff's motion overruled, verdict ordered for the defendant, and judgment thereon. The plaintiff excepted.

Cook & Norton and *W. W. Miles* for the plaintiff.

No notice having been given that the defendant would dispute the execution of the note, its production at the trial entitled the plaintiff to a judgment without further proof. County Court Rule 13; *Blaney v. Pelton*, 60 Vt. 275; *Stevenson v. Gunning's Est.*, 64 Vt. 601; *Redding v. Redding's Est.*, 69 Vt. 500.

It has been repeatedly held in this State that when one who signs his name upon the back of a note in blank becomes *prima facie* liable as maker; the endorsement being in blank, parol evidence may be given of the real obligation intended

to be assumed. *Barrows v. Lane*, 5 Vt. 161; *Bank v. Marble Co.*, 61 Vt. 106; *Ballard v. Burton*, 64 Vt. 387.

One who thus writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the instrument, and it makes no difference that he does this after the making of the note. *Knapp v. Parker*, 6 Vt. 642; *Flint v. Dodge*, 9 Vt. 345; *Strong v. Riker*, 16 Vt. 554; *Little v. Keyes*, 24 Vt. 118; *Ballard v. Burton*, *supra*; *Brooks v. Thacher*, 52 Vt. 559; *Sylvester v. Downer*, 21 Vt. 355.

The unexpressed intention of the defendants, Prouty and Miller, when they added their signatures to this note, cannot in any way affect the plaintiff's right of recovery. *Nash v. Skinner*, 12 Vt. 219; *Sanford v. Norton*, 17 Vt. 285; *Flint v. Day*, *supra*.

It is immaterial at whose request these defendants signed. *Little v. Keyes*, *supra*.

The defendant company cannot defend on the ground that the note was not approved as required by its by-laws. *Cook on Corp.* s. 761.

The vote taken by the plaintiff regarding the disposition of the assets of the International Company does not discharge these defendants. *Viele v. Hoag*, 24 Vt. 46; *Close v. Close*, 4 DeG. M. & G., 176; *Wyke v. Rogers*, 1 Ib. 408.

The plaintiff having made a *prima facie* case by the introduction of the note, his motion for a verdict should have been granted. *Ballard v. Burton*, *supra*; *Bank v. Marble Co.*, *supra*; *Sylvester v. Downer*, *supra*; *Blaney v. Pelton*, *supra*; *Stevenson v. Gunning's Est.*, *supra*; *Redding v. Redding's Est.*, *supra*.

Young & Young for the defendants.

Prouty and Miller are guarantors, and are not liable as joint makers. In order to create the relation of joint makers between the parties they must all have signed the note before its delivery for one and the same consideration, or in pursuance of a contract made before delivery. *Mecorney v. Stanley*, 8 Cush. 85; *Bank v. Willis*, 8 Met. 504; *Benthall v. Judkins*, 13 Met. 265; *Tenney v. Prince*, 4 Pick. 385. If an irregular endorsement is made after the delivery, it is a guaranty and not an original undertaking. 2 Randolph Com. Paper, s. 829; 1 Daniell's Neg. Instr. s. 715; *Whiteman v. Childress*, 6 Humph. 303; *Goode v. Martin*, 95 U. S. 90; *Benthall v. Judkins*, *supra*; *Rey v. Simpson*, 22 How. 341; *Moore v. Folsom*, 14 Minn. 440; *Crawford v. Lyth*, 70 N. C. 385; *Hayden v. Welden*, 43 N. J. L. 128.

The undertaking of Prouty and Miller was without consideration. Mere forbearance to sue, without an agreement to that effect, is no consideration for their signatures. *Manter v. Churchill*, 127 Mass. 31; *Mecorney v. Stanley*, *supra*; *Russell v. Buck*, 11 Vt. 166.

The agreement of September 30, 1898, operated as a discharge of the Company. Prouty and Miller being guarantors, as such were discharged by it. *Paddleford v. Thacher*, 48 Vt. 574.

Prouty and Miller signed at the plaintiff's request and not that of the Company, and are not liable to the plaintiff. *Nelson v. Harrington*, 16 Gray, 139.

TYLER, J. Special assumpsit, in which the International Company, G. H. Prouty, O. C. Miller, and H. E. Folsom are declared against as joint makers of a promissory note for \$5,000, dated June 12, 1886, payable on demand, with interest semi-annually. The note is signed by the defendant company,

waiving "all right or claim to the statute of limitations;" across the end, upon its face, is written: "J. A. Prouty, O. C. Miller, Ex. Committee;" on the back appears: "Waiving demand and notice.

H. E. Folsom,
O. C. Miller,
G. H. Prouty."

The defendants severally pleaded the general issue, the statute of limitations, discharge and release; replication, similitur to first plea, estoppel to second, traverse of third; rejoinder, traverse of replication to second plea, similitur to replication to third plea. No notice was filed denying the execution of the note. The interest was indorsed to August 10, 1901. At the close of the evidence each party moved for a verdict upon the undisputed evidence in the case; a verdict was directed for the defendants, and the case comes here upon exceptions to that ruling.

Defendant Miller was, when the note was executed and when he indorsed it, a director, a member of the executive committee, and the manager of the International Company, which was a duly organized corporation; J. A. Prouty was a director in the company, its president, and a member of its executive committee. He died before the suit was brought, and is not mentioned in the writ or declaration as a party to the note. Folsom was then a director and the treasurer, and he was also a trustee in the plaintiff corporation. He pleaded his discharge in insolvency, and a non-suit was entered as to him. G. H. Prouty became a director in the company July, 1890, and continued such until September, 1898.

The plaintiff introduced the note in evidence, and claimed to hold said Miller as a joint original maker both by reason of his name appearing upon the end of the note and upon its back.

The defendants claimed that Miller's name was not placed upon the face of the note to bind him personally, but as a part of its execution, as required by article 9 of the by-laws of the company, and offered the by-law in evidence to show that fact, and to show that, upon the plaintiff's claim that Miller was a joint maker, the note was never executed by the company;—in other words, if placing his name upon the end of the note made him personally liable, then the note was not approved by two members of the executive committee. There being no notice, under Rule 13, that the defendants would deny the execution of the note, the plaintiff claimed that, upon the declaration and pleadings, the by-law was not admissible to show how or when the note was executed by Prouty and Miller.

The by-law is as follows: "Article 9. All notes of the corporation shall be signed by the president and countersigned by the treasurer and approved by at least two of the executive committee, and no contract to purchase to the amount of five thousand dollars or more shall be made by the manager without the approval of two or more of the executive committee, and all contracts made by the manager shall be reported to the executive committee once each month."

Under the plaintiff's exception, Miller testified that he placed his name upon the face of the note to complete its execution, in compliance with the by-law. Upon this point, we hold that Rule 13, which requires a written notice to be filed when the defendant intends to deny the execution of the instrument upon which an action is founded, does not apply to this case; for here the defendants did not deny any signature upon the note in suit, but did claim the right to show the capacity in which the persons signed the note and their relation to it, for which purpose the by-law and testimony were properly admitted. *Bigelow & Hoagland v. Stilphen*, 35 Vt. 521.

It appeared that the plaintiff had no notice of this by-law, unless from the facts that Folsom was a trustee of the plaintiff corporation when he signed the note as treasurer of the International Company, and that he had previously signed another note for the company in like manner, and as director of the plaintiff had approved the note for the plaintiff, which discounted it, and owned it when the note in suit was executed.

1. On this point we hold that the defendant having issued the note, duly signed by its president and treasurer, and having received the money upon it, cannot now repudiate it for the reason, if it existed, that the approval of the company's executive committee did not appear upon the note. This was a rule of the company and could not affect the plaintiff, which parted with its money in reliance upon the validity of the note. The by-law was directory to the manager, and was for the obvious purpose of restraining him from borrowing money without the approval of the executive committee, and not to render the note invalid in the hands of a holder without notice, for value. But this discussion is unnecessary, for there is nothing in the case to indicate that J. A. Prouty and O. C. Miller wrote their names upon the face of the note for any other purpose than to comply with the by-law.

2. It appeared that Folsom indorsed the note before it was delivered; that in December, 1893, he became insolvent, and that the plaintiff employed one Harris, who was not connected with the bank, to go to Newport and obtain additional signers upon the note; and that Miller and G. H. Prouty wrote their names upon the back of it under that of Folsom. Harris and the defendants differed in their account of the conversation that took place on that occasion, but from what was said, from the fact that the plaintiff did not want the money upon the note, but wanted more signers, from the fact that the note was allowed

to run, and from other attendant facts and circumstances, the jury might have inferred that it was mutually understood by Miller and Prouty, as officers of defendant company, and by Harris, acting for the bank, that if Miller and Prouty would sign the note, the bank would forbear its collection and allow it to run a reasonable time longer. What the understanding was, was a question of fact for the jury. *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

What relation Miller and Prouty assumed to the note by placing their names upon it was a question of fact, and not of law. If they became joint makers, no demand was necessary, and this action was properly brought against them. If they were indorsers, it could not be held, as matter of law, that they waived demand and notice by placing their names under the name of Folsom, who, when the note was executed, signed it as indorser, waiving demand and notice; and if there was an agreement or understanding between the parties that the time of payment should, in consideration of their signing the note, be forborne, there being no time of forbearance specified, it would mean, in law, a reasonable time. What constituted a reasonable time, in the circumstances, was a question of fact for the jury, and as against Miller and Prouty, the statute of limitations would begin to run at the expiration of such reasonable time. If they were guarantors, the proof did not support the declaration, and there was a variance, for a guaranty is not a primary obligation, but an undertaking to answer for another's liability, and in that case they were not properly joined in this action.

3. The defendants contend that, to create the relation of joint makers between the parties, the defendants must have signed the note before its delivery, and for a consideration common to all the signers. It is laid down by many authorities that

one who indorses his name in blank upon a promissory note after its delivery is not liable as an original promisor, because he did not partake in the original consideration; that, to hold such a signer liable as maker, it must appear that he signed his name pursuant to a promise made at the time the note was given; otherwise, he may not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved. It is held that, where one thus indorsed a note pursuant to an agreement made with the payee before the note was made, though without the maker's knowledge, the act made him a joint promisor with the maker, it being considered as done at the time the note was made. *Mecorney v. Stanley*, 8 Cush. 85; *Bank v. Willis*, 8 Met. 504; *Hawks v. Phillips*, 7 Gray, 284.

It is the general rule, held by many Courts of last resort and laid down in the text-books, that where a promissory note is indorsed in blank, after its delivery, by any other person than the payee, it is a new and independent contract between the indorser and the holder, upon a new consideration moving between them, and is a contract of guaranty. 2 Rand. Com. Paper, § 829; 1 Dan. Neg. Instr. § 715; Sto. on Prom. Notes, § 133, *et seq.*; *Goode v. Martin*, 95 U. S. 90; *Essex County v. Edmunds*, 12 Gray, 273; *Howe v. Taggart*, 133 Mass. 284.

The reasons for this rule are that the amount of the debt, the time of credit, the names of the makers of the note are all agreed upon, the note is delivered, and the money passed without reference to any other person becoming obligated for payment. Afterwards a third person indorses the note in blank. The Courts that hold this rule say he is not liable as a joint maker, because he had no part in the consideration, and the payee accepted the note without reliance upon him.

But, as was remarked by the Court in *Bank of Bellows Falls v. Dorset Marble Co.*, 61 Vt. 106, it is unnecessary to

examine the law in other jurisdictions, for we must be governed by our own decisions until there is occasion to reverse them. And it has generally been held by this Court that one not before a party to the note, who signs his name upon the back of it, in blank, is *prima facie* a maker, and assumes the same obligations as if he wrote his name upon the face of the instrument. In *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786, the rule was extended and emphasized, for it is there declared that it makes no difference that the signing is long after the making of the note, and while it is in circulation, for the reason, as stated by Judge REDFIELD, that if the signer consents to be thus bound, and induces others to take the note under that expectation, he will be estopped to deny that fact, and will be treated the same as if he had signed the note at its inception. It was, however, held in that case, that the indorsement being in blank, the real obligation intended to be assumed—whether that of maker, guarantor or indorser—might be shown by parol evidence. In *Bank v. Dorset Marble Co.* this rule was recognized and reaffirmed.

In this case the plaintiff's evidence tended to show this situation: Folsom's name upon the note had become worthless, and the plaintiff wanted new signers, and, through its agent, applied to the defendants, apparently because they were officers of the company and interested in its behalf. The defendants placed their names upon the note for some purpose. Their signatures were evidence of some contract, and parol evidence was admissible to show what it was. By the original contract the plaintiff had taken the company's note, and loaned it money. By the defendants placing their names upon the note, that contract was to continue,—the plaintiff to hold the note, and the company to keep the money. The plaintiff claims that the defendants took the place of Folsom on the note, and that the con-

tract was then to run on indefinitely, and that in this way the defendants became joint promisors with the original makers and participated in the original consideration in the same manner they would have done if they had signed the note before its delivery. On the other hand, the defendants contend that their liability was that of guarantors.

It cannot be held as a matter of law that the vote taken by the bank and its subsequent receipt of payments from the committee of the International Company, discharged that company. If the bank, in doing what it did in these respects, did not act in good faith towards Miller and Prouty, and the latter were prejudiced by those acts, then they had a defence to the extent to which they were thereby damaged. Rob. Dig. 557-8. If Miller and Prouty were sureties for the International Company and the plaintiff discharged the company, upon receipt of the dividend, without Miller and Prouty's consent, then they were discharged.

The fact that Miller, as manager of the defendant company, knew of the vote of the bank, and paid dividends to it, did not estop him or Prouty from taking advantage of the discharge of the company if it was discharged. The question was whether the bank acted in good faith towards Miller and Prouty, and if not, whether the latter were thereby damaged, and these were questions for the jury.

It was not necessary for the plaintiff to show by direct evidence that the defendant company requested Miller and Prouty to sign the note. This might be inferred from the fact that they were officers of the company, and from other circumstances attending their placing their names upon the note.

Judgment reversed and cause remanded.

ROBERT AVERY v. VERMONT ELECTRIC CO., et al.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON and STAFFORD, JJ.

Opinion filed March 6, 1903.

Eminent domain—Flowage act—Public use—Riparian rights
—V. S. c. 159.

To entitle one to invoke the power of eminent domain provided in V. S. c. 159, the use to which the water power is to be applied must be a public use within the meaning of the Constitution; and the conditions which make the use a public one must exist at the time of the taking.

The generation of electricity by an individual, for the purpose of supplying a railroad with power to operate its road, is not such a public use.

Flowage rights cannot be acquired under V. S. c. 159 on the theory that that chapter is a mere statutory regulation of the rights common to riparian owners.

PETITION under V. S. c. 159. Heard on Vermont Electric Co.'s motion to dismiss, at the September Term, 1902, Chittenden County, *Start*, J., presiding. Motion sustained, and petition dismissed as to that defendant. The petitioner excepted.

Edmund C. Mower for the petitioner.

Two questions are raised for consideration. (1) Is the application of water power, developed by the raising of a dam as contemplated by chapter 159 of the Vermont Statutes, to the operation of a railroad by electricity, a public benefit justifying the exercise of the right of eminent domain under the so-called flowage acts? (2) If not, are said acts constitutional as involving a legitimate legislative control over the common rights and interests of riparian owners?

The operation of the railroad is a public benefit. *Williams v. School District*, 33 Vt. 271. The term "public use" should receive a liberal construction, and should not be made to depend upon whether the entire community, or any considerable part of it, may directly enjoy the benefits of it. *Talbot v. Hudson*, 82 Mass. 417; *In re Gas Light Co.*, 63 Barb. 437; *In re Whitestown*, 53 N. Y. 397; *Allen v. Joy*, 60 Me. 140. This case is distinguishable from *Tyler v. Beacher*, 44 Vt. 648.

The fact that the legislature has provided for the exercise of the right of eminent domain for the purposes specified in these acts, while not controlling, raises a presumption in favor of the public character of the uses specified. *Rensselaer v. Leopold*, 106 Ind. 29; *Welton v. Dickson*, 38 Neb. 767; *Beekman v. Railroad Co.*, 3 Paige, 73; *Hazen v. Essex Co.*, 12 Cush. 475; *Talbot v. Hudson*, 16 Gray, 417; *Stewart v. Supervisors*, 60 Ia. 9.

If it be considered that the only ground upon which the petitioner may enjoy the benefit of the flowage acts is that he apply his water power to railroad purposes only, such application would be the condition on which he would hold his privileges; and a violation of such condition would work a surrender. 10 Am. & Eng. Ency. 1203; *Wood v. Mobile*, 107 Fed. 846; *Proprietors v. Railroad Co.*, 104 Mass. 1; *Baird v. Hunter*, 12 Pick. 555.

It is objected that while the ultimate end sought by the petitioner may be a public benefit, he shows no necessary connection between that end and the means he seeks to adopt. *Eldridge v. Smith*, 34 Vt. 484. is relied upon. We insist that necessity is a question of fact, and is, in the first instance, for the determination of the commissioners. But absolute necessity is not required. *Railway Co. v. Harvey*, 178 Ill. 477;

District v. Brandon, 103 Cal. 384; *Mining Co. v. Corcoran*, 15 Nev. 146; *In re Railway Co.*, 52 L. R. A. 879.

Public use is synonymous with public benefit or advantage. *Mining Co. v. Seawell*, 11 Nev. 394.

The fact that the petitioner intends to lease the power to another is immaterial. *Company v. Manufacturing Co.*, 35 Conn. 496.

The acts in question are sustainable, on well established principles of law, as a legitimate statutory regulation of the enjoyment of common rights by riparian owners. *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9. and cases cited. Note to *Allen v. Inhabitants of Jay*, Am. Law Reg., August, 1873; *Jones v. Skinner*, 61 Me. 25; *Waddy v. Johnson*, 5 Ired. 333; *Lowell v. Boston*, 111 Mass. 454; 154 Mass. 579; *Wurts v. Hoagland*, 114 U. S. 606; *Coster v. Tide Water Co.*, 3 C. E. Green, 54; 32 Ind. 169.

W. L. Burnap and A. G. Whittemore for the defendant.

The necessary prerequisite of "public use" is wanting. 1 *Lewis Em. Dom.* 158, 180, 238; *Tyler v. Beacher*, 44 Vt. 648; *In re Barre Water Co.*, 62 Vt. 27.

The test is, will all persons, upon demand, be served by the party who claims to be fulfilling a public purpose, and can such demand be enforced? *Scudder v. Company*, 1 N. J. Eq. 694; 44 Vt. 648.

The statute is unconstitutional. *In re Barre Water Co.*, *supra*; *Trout & Salmon Club v. Mather*, 68 Vt. 338.

MUNSON, J. The petition alleges that the petitioner is the owner in trust of a certain mill property on the Winooski river, and that he desires to raise to the height of fifty feet a dam now existing on said property, and proposes to use the

water-power so provided in generating electricity for the operation of the Burlington and Hinesburgh railroad; shows further that the raising of this dam will flow the lands of other owners, and that the petitioner is unable to agree with them as to the damages they will sustain; and prays that he may be permitted to raise said dam, and for the appointment of commissioners to ascertain the damages caused thereby. It was moved that the petition be dismissed because it did not appear from the allegations that the flowage would be a public benefit, or such a public benefit as would warrant the taking under the Constitution. The County Court sustained the motion. No objection is taken as to the manner in which the question is raised.

It is provided in chapter 159 of the Vermont Statutes that one who desires to set up or continue a mill or manufactory on his land, and to erect or continue or raise a dam to obtain water therefor, and thereby flow the lands of another person, may secure the right to do so in the manner there provided, if commissioners appointed for that purpose, or the Court itself, shall find "that the flowing of the land as proposed will be of public benefit." For the purposes of this discussion, it will be assumed, without consideration, that a plant for the generation of electricity, is a manufactory within the meaning of the statute.

The first question for consideration, as stated by the petitioner, is whether the application of water-power to the generation of electricity for use in the operation of a railroad is such a public benefit as will justify an exercise of the right of eminent domain under the provisions of this chapter. But this statement of the inquiry is hardly broad enough for our purpose; for this assumes that the statute names a constitutional ground of condemnation, and proposes to test the peti-

tioner's right by inquiring whether his case is within its terms. A more accurate statement of the question would be, whether this is a public use within the meaning of the Constitution; for no finding of public benefit under the statute can avail, unless the statute and the constitutional provision are brought together by construction.

The argument of the petitioner is an earnest plea for a liberal construction of the term "public use." It is evidently considered that the term "public benefit" is a better expression of what is meant, and cases are cited where it is said that "public use" is synonymous with that term. We are also referred to the utterance of this Court in *Re Barre Water Company*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195, where it is said that the power of condemnation "must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever-varying and constantly increasing necessities of an advancing civilization." It is urged that the use of electricity has become so important to the prosperity and development of the State that the utilization of our water-powers for its production ought to be regarded as a public necessity.

We have in the petitioner's brief an extended presentation of the views expressed by other Courts in dealing with the question of public use. In considering these opinions, it must be remembered that some States have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision. It is true, nevertheless, that some of the cases cited proceed upon grounds that afford support to the petitioner's contention. In fact, the reasoning of some of them comes dangerously near the argument that it is for the public benefit to have property of this character in the hands of those who will put

it to the best use, and that the refusal of an obstinate or grasping owner to part with his property ought not to be allowed to block the wheels of progress. It is needless to say that arguments of this character can have no weight in the determination of cases arising under the Constitution of this State.

Our only decision upon the flowage law is found in *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398. It was there held that the owner of a grist-mill who was under no obligation to grind for the public, could not flow the lands of another to increase his power, for the reason that the use was private. It is said by the petitioner that that case is opposed to the decisions of most of the States which have passed upon the question, and this is true. But we find nothing in the arguments of other Courts that leads us to question its soundness, and have no disposition to recede from it. A review of the adverse line of decision will be found in *Lewis on Eminent Domain*, sections 178-181. This author considers that mills which are not required by law to serve the public, while they may be a public benefit, are not a public use within the meaning of the Constitution, and says that the circumstances under which the contrary decisions were made may explain, but do not justify them.

But it is said that the purpose of this condemnation is to provide motive power for a railroad, and that the railroad is unquestionably a public servant. Treating the case as if the application were by the railroad company itself, the reasoning of this Court in *Eldridge v. Smith*, 34 Vt. 484, is decidedly against the right. The distinction between taking the land necessary for the road, and the taking of property for use in the production of the means to be employed in carrying it on, is there clearly pointed out. But it is not necessary to resort to an application of this doctrine, for the reason of the decision

in *Tyler v. Beacher* is controlling here. If the petitioner's purpose were found to be as alleged, this would not meet the requirement. It is true that the railroad must serve the public, but there is nothing that binds the petitioner to serve the railroad. And if we look to some direct service of the general public, there is nothing that binds the petitioner to give equal advantages to all. The suggestion that a failure in this respect would work a forfeiture does not remove the difficulty. The conditions which make the use public must exist at the time of the taking.

We have thus far considered the statute upon the theory that it was designed to give the right of eminent domain to every riparian owner for the maintenance of a mill or manufactory of public benefit. This was the view formerly taken of the mill act of Massachusetts; but the more recent doctrine of that State is that the provision is not an exercise of the right of eminent domain, but a statutory regulation of rights common to the riparian owners. It is insisted that the petition can be sustained on this ground.

The doctrine referred to is claimed to be analogous to that upon which provision is made for the partition of land held by several tenants in common. The different owners of the bed and banks of the stream are treated as having a common interest in the reasonable use of the flowing water. It is said that one reasonable use of the water is the use of the power inherent in the fall of the stream, that this power cannot be used without damming the water and causing it to flow back, and that one man may own the fall, and another the land which it is necessary to flow. The Courts of Massachusetts hold that the Legislature may secure the full value of the stream to the different owners by combining these two inter-

ests for use, and compelling the owner of the flooded land to take his share in money. This doctrine is apparently approved by Judge REDFIELD in his note to *Allen v. Inhabitants of Jay* in the American Law Register for August, 1873, and sanctioned by the Supreme Court of the United States in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. Ed. 889.

We cannot adopt this view. It seems to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights to the water. But the owners of the various properties are the several and independent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water, is to reverse all our theories regarding the use of streams. It is true that in *Johns v. Stevens*, 3 Vt. 308, Judge PRENTISS seems to assume that it would be within the power of the Legislature to encourage the building of mills by a statute of this character. But in *Adams v. Barney*, 25 Vt. 225, where the right of the owner of one side of the stream to maintain a dam across it was involved, Judge REDFIELD said that the land on the opposite side was the defendant's, and that the plaintiff had no right to use it, and that no Court or Legislature had the power to give him the right. This certainly excluded the idea of an acquirement of mill-privileges through a statutory regulation of riparian rights.

It should be noticed, also, that the argument advanced in support of the statute as thus classified is not co-extensive with the right given. The argument is based upon the existence of a common interest in the stream, while the statute applies to all flowable lands. A dam of mod-

erate elevation may flood the land of one whose premises are not contiguous to the stream, and who consequently has no interest in it. The maintenance of the petition upon the ground last urged would amount to a holding that all private lands in the State that can be flowed by the highest practicable dams are held subject to the full utilization of the streams upon which they lie. The Massachusetts Court supports its position by holding that the mere flowing of land is not a taking of the property, a conclusion which we are not ready to adopt. We think Mr. Lewis is right in saying that appropriations of this character cannot be sustained without virtually expunging the words "public use" from the Constitution.

Judgment affirmed.

WILLIAM L. SCOVILLE v. JAMES W. BROCK.

October Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, STAFFORD and
HASLTON, JJ.

Opinion filed March 6, 1903.

*Guardians—Final accounting—Approval of ward—Fraud—
Effect of decree.*

A bill to impeach the final account of the orator's former guardian, which alleges that the orator's approval thereof was obtained by the guardian's fraud and concealment, but shows that the account was approved and allowed by the Probate Court and does not charge that such allowance was based upon such approval and without inquiry, is demurrable.

The final settlement of a guardian's account, made on notice after the ward becomes of age, is conclusive as to all matters which appear from the record to have been adjudicated, except in proceedings brought directly to correct or annul it.

APPEAL IN CHANCERY. Heard on the defendant's demurrer to the bill, at the September Term, 1902, Washington County, *Watson*, Chancellor. Demurrer sustained, and bill dismissed. The orator appealed.

William L. Scoville and *Edward H. Deavitt* for the orator.

The approval of the guardian's account by the orator is not a bar to the relief prayed for, for the reason that it would be inequitable for the defendant to be allowed to avail himself of an approval which was the product of the confidential relation. *Bigelow* on Est. 572, 573; *Farrant v. Blanchford*, 1 DeG. J. & S. 107; *Lay's Exrs. v. Barnes*, 4 S. & R. 112; *Luken's Appeal*, 7 W. & S. 48; *Williams v. Powell*, 1 Ired. Eq. (N. C.) 460; *Johnson v. Johnson*, 2 Hill Eq. 277; *Waller v. Armistead's Admrs.*, 2 Leigh, (Va.) 11; *Wade v. Pulsifer*. 64 Vt. 45.

In this case fraud and concealment are alleged, for which the approval would be set aside. *Perry* on Trusts, s. 200; *Smith v. Kay*, 7 H. L. Cas. 771.

M. E. Smilie for the defendant.

The defendant turned over to the orator such assets as came to his hands as guardian. He was under no obligation, by the laws of this State, to do anything more. We have no statute regulating the investment of trust funds under the circumstances of this case. Furthermore, the bill shows that the guardianship account terminated in a decree of the Probate

Court, wherein the defendant was ordered to deliver to the orator the securities complained of. Thereby the whole matter became *res judicata*. V. S. 2810.

MUNSON, J. The bill alleges in substance that the defendant, as guardian of the orator, received certain property decreed to the orator as legatee; that among this property were certificates representing shares of the capital stock and certain debenture bonds of various corporations located without the State; that when the defendant received these shares and bonds they were worth, and could readily have been sold for, more than the par value thereof; that the capital stock and debenture bonds of a foreign corporation are not a proper selection for the investment of trust funds, and that it was the duty of the defendant to refuse this property, or, having received it, to be diligent in disposing of it; that the defendant remained the orator's guardian until the 28th day of July, 1894, when the orator became of age; that on the 30th day of July, 1894, the defendant presented to the Probate Court a final account of his guardianship, in which said shares and bonds were returned as assets in his hands; that on the same day the orator endorsed on said account a certificate that he had examined and approved it, and that on the first day of August following the Probate Court accepted and allowed said account, and ordered that said securities be delivered to the orator; that the securities were transferred to the orator immediately thereafter, and that most of them were then wholly valueless.

The bill complains that it was the duty of the defendant, in settling his accounts with the orator, to disclose to him any facts that might be necessary to inform him as to the full extent of his legal rights and remedies, and to refrain from any deception in obtaining the orator's approval of his final ac-

count, and from any deception intended to prevent the orator from calling him to account for his breach of trust; but that the defendant wholly disregarded his duty in these respects, and failed to inform the orator that after four years from the date of said decree the orator would be barred from having a further accounting and from proceeding against the surety on the defendant's bond, and that after eight years no action could be maintained against the defendant as principal on said bond; that defendant used undue and improper influence to induce the orator to approve said account, in that he gave the orator false and fraudulent information on which the orator relied, and in that he failed to give him the facts necessary to inform him of the extent of his legal rights and remedies; that defendant did not inform the orator that he had a right to object to receiving the property in the form in which it was tendered, but might demand cash in place of it, and in case of a refusal upon such demand, might have a hearing before the Probate Court on the questions involved; that the defendant, with intent to prevent the orator from calling him to account, informed the orator that the investments had been made before the property came into his hands, that he was under no duty to change the investments, that he had used due care and diligence in looking after the estate, and that the loss was occasioned by a depreciation of the securities without his fault; that the orator was induced to approve the account and accept the property by his reliance upon these statements, and his belief that the defendant had disclosed to him all the facts necessary to inform him of his rights and remedies, and that the defendant had committed no breach of trust for which he could be called to account; and that his approval and settlement have no effect in bar of his relief, because of this fraudulent procurement.

It will be seen from this statement that the accounting is treated as a settlement between the guardian and the ward, and that the orator's approval of the account as rendered is looked upon as the barrier to be removed. But the bill shows that the account was presented to the Probate Court, and was allowed by it; that the account was so framed as to show what the balance in the guardian's hands consisted of; and that the securities on hand were decreed to the orator. It thus appears that the securities in question were brought to the knowledge of the Court, and within the scope of its decree. Without considering the sufficiency of the allegations which charge that the orator's approval was procured by fraud, it is to be noticed that there are no allegations which carry the effect of the alleged fraud into the decree, by showing that the action of the Court was based upon the approval. For all that appears, the decree may have been based upon the same inquiry and consideration that would have been had in the absence of any approval. The allegation that the defendant did not inform the orator that he had a right to demand cash, and, in case of a refusal, have a hearing upon the questions involved, does not meet the objection. This is not an allegation that the decree was made because of the approval and without inquiry. Conceding, then, that the orator is not barred by his approval, we come to a consideration of the effect to be given to the decree in a proceeding which does not seek to impeach it.

V. S. 2810, upon the construction given it by both parties, makes this final allowance conclusive between them after the lapse of four years. But independent of any statute, a decree of the Probate Court is conclusive as to all matters which appear from the records to have been adjudicated, except in proceedings brought directly to correct or annul it. *Rix v. Smith*, 8 Vt. 365. An accounting like the one in question is to

be distinguished from the accounts rendered for the information of the Probate Court during the ward's minority. The final settlement of a guardian's account, made on notice after the ward becomes of age, is within the general rules relating to the conclusiveness of judgments. 2 Black on Judg. § 644; 15 A. & E. Ency. Law (2 ed.) 115; *Gratton v. Botts*, 73 Mo. 274. We have seen that the record of this accounting brings the matters complained of within the scope of the decree. So the questions raised regarding the defendant's administration of his trust are *res judicata*, and the determination is conclusive as against this bill.

But the orator says his bill proceeds upon the theory that it would be inequitable to permit the defendant to set up the decree of the Probate Court as a defense to the accounting prayed for, for the reason that the defendant obtained the decree through fraud; and it is argued that the defendant is equitably estopped from pleading the decree. Conceding that the adjudication can be thus put aside, this but brings us back to the question already considered. The claim, as here stated, stands upon the assertion that the decree was procured by fraud, and we have seen that the allegations that the orator's approval of the account was so procured are not followed by averments sufficient to carry the effect of that approval into the decree. The allegations of the bill may all be true, and yet the account have been disposed of upon a full hearing of the questions now presented, and irrespective of the approval. We therefore hold the bill insufficient on demurrer, without further inquiry.

Decree affirmed, and cause remanded.

FRED W. FRINK'S ADMR. v. BROTHERHOOD ACCIDENT CO.

May Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD and
HASLTON, JJ.

Opinion filed March 6, 1903.

*Accident insurance policy—More hazardous occupation—
Meaning of term "cattle tender"—Construction.*

The term "cattle . . . tender in transit," used to designate an occupation classed by an accident insurance company as more hazardous than the one named in the policy, does not include a person tending a horse in transit.

The rule, that insurance contracts are construed against the company, applies to those issued by a mutual company.

ASSUMPSIT on an accident insurance policy. *Pro forma* judgment for the plaintiff for the principal sum named in the policy, on an agreed statement of facts, at the March Term, 1902, Washington County, *Start*, J., presiding. The defendant excepted.

Dillingham, Huse & Howland and *H. W. Kemp* for the plaintiff.

The words "cattle shipper and tender in transit" do not apply to the case of a man travelling with a horse. *Brown v. Bailey*, 4 Ala. 413; *Hubotter v. State*, 32 Tex. 479.

Insurance contracts are construed against the company. *Brink v. Insurance Co.*, 49 Vt. 442; *Mosley v. Insurance Co.*, 55 Vt. 142.

The trip with the horse did not amount to a change of occupation. *Eaton v. Insurance Co.*, 82 Me. 570; *Insurance Co. v. Frohard*, 134 Ill. 228; *Accident Asso. v. Kelsie*, 46 Ill. App. 371.

George W. Wing for the defendant.

The insured was engaged in an occupation more hazardous than that in which he was insured, and the right of recovery is limited by the policy. *Aldrich v. Accident Asso.*, 149 Mass. 457; *Insurance Co. v. Martin*, 133 Ind. 376; *Cram v. Accident Asso.*, 58 Hun. 11; *Insurance Co. v. Taylor*, 34 S. W. 78; *Assurance Co. v. Bach*, 102 Fed. 229; *Accident Asso. v. Hilton*, 61 Ill. App. 100; *Knapp v. Accident Asso.*, 53 Hun. 84.

MUNSON, J. The plaintiff's intestate was insured as a barber proprietor, not working. The policy provided that if the holder should be fatally injured "while temporarily or otherwise engaged in or exposed to a hazard pertaining to an occupation or employment classed by the company as more hazardous" than that written upon the policy, the company's liability should be only that "provided for the class in which such more hazardous occupation or exposure is rated in the manual of the company." The occupation of "cattle shipper and tender in transit" is rated in the manual as more hazardous than that for which the deceased was insured. The deceased was killed while travelling in a box-car in charge of a horse in transit. If this employment is not classed in the manual as more hazardous than the insured's usual occupation, this alone will deprive the company of the benefit of the clause relied upon, and it will not be necessary to consider the question presented by the further facts contained in the agreed statement.

So the question for determination is whether the term "cattle," as used in defendant's policy, should be construed to include horses. Lexicographers give the word two meanings; one, restricted to domestic bovine animals; the other, covering

any live stock kept for use or profit. The first is ordinarily given as its common meaning; the second, as a special signification, less frequent now than formerly. The meaning of the word has come in question in a few reported cases. In *Brown v. Bailey*, 4 Ala. 413, it was held that a declaration for an injury to cattle was not supported by evidence of an injury to mules, as the term did not, in common parlance, include mules. In *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, the question arose upon the plaintiff's guaranty of a dealer's drafts against shipments of cattle, and it was held that hogs were included in the term "cattle." The Court referred to several English cases where the word was given its broader signification, as showing that this meaning was permissible, and considered that this should be taken as the meaning of the parties, in view of the purpose of the contract and the course of dealing apparent from the evidence. In cases involving the construction of statutes relating to fences, it seems generally to have been held that the word applies to all domestic quadrupeds. 5 A. & E. Ency. Law (2d Ed.), 771. But in *Enders v. McDonald*, 5 Ind. App. 297, where a statute of this character was considered, the Court reached a contrary conclusion; saying that the word, in its ordinary sense, as used in this country, meant only beasts of the bovine genus.

It is certain that in this country the word "cattle" is not ordinarily used as including horses, and it should not be construed to include them as used here, unless the Court can properly infer from the purpose of the provision that the parties so intended. It may be that the protection sought by the company would require an application of the provision to horses as well as cattle, but this alone will not justify an inference of mutual understanding. In the construction of insurance policies, it is considered that, inasmuch as the com-

pany prepares the contract and selects the language used, provisions restrictive of the general obligatory clause should be construed strictly against the company. *Billings v. Metropolitan Insurance Co.*, 70 Vt. 477 (485). We think that, in determining the language of a provision like this, the company should select words that will accomplish its purpose without their being given any unusual meaning.

Judgment affirmed.

The defendant seeks a re-hearing on the ground that the rule of construction applied in arriving at the decision is not applicable to mutual companies. It is held in the cases to which we are referred that the members of a mutual company are charged with knowledge of its rules and regulations. This is undoubtedly an established doctrine, but it comes short of sustaining the defendant's contention. One may be charged with knowledge of a by-law, and yet be entitled to a favorable rule regarding the construction of its ambiguous terms. The reason given for this rule is as applicable to the contracts of companies like the defendant as to those of other companies. It will be seen from the list of cases cited in 3 Berryman's Insurance Digest, § 3012, that the rule has been applied to companies of every class, and we have nowhere found any suggestion that its application in the case of mutual companies is inconsistent with the doctrine above stated. We think a further hearing is unnecessary.

Motion overruled.

CLARENCE G. STODDARD v. CAMBRIDGE MUTUAL FIRE
INSURANCE CO.

January Term, 1903.

Present: MUNSON, STARR, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed March 13, 1903.

Bill of exceptions—Reference to testimony—Presumption against excepting party—Motion for verdict—Motion for judgment non obstante.

When the whole testimony is referred to in a bill of exceptions and only a part is furnished, and the bill does not show that such part includes all the testimony bearing upon the questions raised, it cannot be said that the trial Court erred in overruling a motion for a verdict.

A motion for a judgment *non obstante* is not granted in favor of a defendant when the pleadings are as they are here.

Doubts raised by a bill of exceptions are solved against the excepting party.

GENERAL AND SPECIAL ASSUMPSIT on a fire insurance policy. Plea, the general issue. Trial by jury at the September Term, 1902, Windham County, Tyler, J., presiding. Defendant's motion for verdict overruled. Verdict for plaintiff. Defendant's motion for judgment *non obstante* overruled. Judgment on verdict. The defendant excepted.

Waterman & Martin and *Gilbert A. A. Pevey* for the defendant.

There is nothing in the case to show that the defendant, at the time of the commencement of the suit, was doing business or had any office or place of business in this State, or that the persons alleged as trustees were the authorized agents

of the defendant. So the jurisdiction of the Court does not appear. *Aldrich v. Blatchford*, 17 Mass. 371; *Johnston v. Insurance Co.*, 132 Mass. 432; *Rogers v. Association*, 157 Mass. 373; *Osborne v. Insurance Co.*, 51 Vt. 278; *Sawyer v. Insurance Co.*, 46 Vt. 704; *Mill Co. v. Insurance Co.*, 3 Vroome, 15; *Milk Co. v. Brandenburg*, 11 Vt. 111.

The provision for arbitration was valid, and a condition precedent to a right of action. *Hutchinson v. Insurance Co.*, 153 Mass. 143; *Hamilton v. Insurance Co.*, 137 U. S. 385; *Fisher v. Insurance Co.*, 95 Me. 486; *Insurance Co. v. Morton*, 106 Tenn. 858.

There having been no arbitration or attempt on the part of the plaintiff to procure one, this action is premature. *Cook v. Insurance Co.*, 181 Mass. 103.

There is no evidence of a waiver of the arbitration clause or of any denial of liability before the suit was brought. *McDowell v. Insurance Co.*, 164 Mass. 447.

Clarke C. Fitts for the plaintiff.

An action on an insurance policy is transitory. V. S. 4165; *Osborne v. Insurance Co.*, 51 Vt. 281; *Johnston v. Insurance Co.*, 132 Mass. 432.

But here the question is not raised by a plea to the jurisdiction; the defendant appears generally and goes to trial on the general issue, which gives jurisdiction. 2 Enc. Pl. & Pr. 642; *Dartt v. Bank*, 27 Barb. 337; *Platt v. Manning*, 34 Fed. 17; *Railroad Co. v. Cox*, 45 U. S. 593.

By proceeding with its defense, the defendant waived its exception. *Paine v. Webster*, 64 Vt. 105.

The motion for judgment does not raise the question of jurisdiction. *Cobb v. Cowdery*, 40 Vt. 27; *Walker v. Sargent*, 11 Vt. 327; *Stoughton v. Mott*, 15 Vt. 162.

The arbitration clause is void. No. 80, Acts of 1898. Besides, the defendant has all the time denied liability, and so waived the provision for arbitration. Joyce on Insurance, s. 3257; *Insurance Co. v. Fowood*, 13 Ky. L. Rep. 26; *Farnum v. Insurance Co.*, 83 Cal. 246; *Soars v. Insurance Co.*, 140 Mass. 383.

STAFFORD, J. The defendant insured the plaintiff's buildings against loss by fire. The buildings were burned and this action is to recover the insurance. The property was situated in Massachusetts, and there the plaintiff resided both when the contract was made and when the loss occurred. The defendant is a Massachusetts corporation, having its place of business in that State. When this action was brought the plaintiff had become a resident of Vermont. The defendant appeared and pleaded the general issue, and the trial proceeded until the close of the plaintiff's testimony, when the defendant moved for a verdict, on the ground that the evidence showed that the Court had no jurisdiction. The motion was overruled, and the defendant excepted, but proceeded with its defense, introducing, however, no evidence affecting the question of jurisdiction. There was a verdict for the plaintiff, after which and before judgment the defendant moved for judgment notwithstanding the verdict. This motion likewise was overruled, and the defendant excepted. We are now asked to sustain these exceptions.

The claim is that the defendant was a foreign corporation and was not shown to have been doing any business in this State nor to have any place of business therein. Assuming, without deciding, that the defendant did not waive the first of these exceptions by proceeding with its defense and omitting to renew its motion, and also that its course did not amount to a waiver of the objection itself, it will be sufficient

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to observe that the whole testimony is referred to in the bill, whereas we have not been furnished with a complete transcript, and are therefore unable to say what did and what did not appear, in these respects, beyond the facts already recited, which are not shown by the exceptions to be all the facts bearing upon the question. It is admitted that if the defendant was doing business in this State and had complied with our statute requiring it to make the Secretary of State its attorney to receive service of process, such service would give the Court jurisdiction. V. S. 4165, 4166. We have not been furnished with a copy of the return, and are not informed what the service was. Evidently there is nothing before us from which we can say that the Court erred in assuming jurisdiction.

The motion for a judgment *non obstante veredicto* was properly overruled, if for no other reason, because it is not granted in favor of a defendant,—certainly not when the pleadings are as they were here. *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652; *Davis v. Streeter*, 75 Vt. 214, 54 Atl. 185.

The policy provided that in case of loss thereunder and failure of the parties to agree as to the amount, that question should be referred to arbitrators, whose award should be final, and that such reference, unless waived, should be a condition precedent to the right to sue. "The defendant contended that the plaintiff was not entitled to recover until the amount of damages had been fixed by arbitration, and on that ground excepted to the charge of the Court in submitting the case to the jury." "There was never any arbitration, or any attempt on the part of the plaintiff to procure an arbitration, as provided by the policy, but the defendant denied liability and plead the general issue." The defendant now asserts that the denial of liability referred to was the denial in Court and that there was nothing to show denial of liability before suit, while the plain-

tiff claims there was evidence of such denial from the first. Here, again, the transcript not being furnished, the doubt must be solved against the defendant, who is the excepting party. So the question is, Did the Court err in submitting the case to the jury at all? It is admitted that in some circumstances denial of liability will amount to a waiver of the arbitration clause. Not having the whole case before us, we can not say that the evidence did not tend to show such a waiver. If it did it was the duty of the Court to submit the question with proper instructions, which, the contrary not appearing, we must presume was done.

Judgment affirmed.

CARLOTTA E. FLETCHER v. A. E. WAKEFIELD.

October Term, 1902.

Present: ROWELL, C. J., TYLER, STARR, WATSON, STAFFORD and
HASLTON, JJ.

Opinion filed May 6, 1903.

Married woman—Property rights—Gift from husband—Delivery—Evidence—Exceptions—V. S. 2647.

A married woman can hold personal property, acquired by gift from her husband, against the attachment of creditors whose claims accrued after such gift.

The defendant's motion for a verdict, based on the claim that there was no sufficient change of possession of the property from the husband to the wife, was properly overruled, since there was evidence tending to show that the husband never owned the property.

Since the record does not show that all the evidence on the subject of a request to charge is set forth, an exception to the Court's failure to comply therewith is unavailing.

On the question whether the husband or the wife owned certain property, evidence that such property was insured in the name of the wife, with the husband's acquiescence, is admissible.

The admission of testimony, immaterial but not prejudicial, does not warrant a reversal.

REPLEVIN for property levied on for a debt against plaintiff's husband. Plea, not guilty. Trial by jury at the December Term, 1901, Caledonia County, *Munson, J.*, presiding. Defendant's motion for a verdict overruled. Verdict and judgment for the plaintiff. The defendant excepted.

Taylor & Dutton for the defendant.

The motion for a verdict should have been granted. The plaintiff's title was not good against the defendant. It was a gift from her husband. V. S. 2647. After the attempted gift, the property remained in the husband's possession, and was attachable on his debt. *Coombs v. Read*, 16 Gray, 271; *Rodgers Dom. Rel.*, s. 153-154; *Odell v. Lee*, 14 Ia. 411; *In Re Hall's Est.*, 70 Vt. 458; *Towle v. Towle*, 114 Mass. 167; *Allen v. Wilkins*, 3 Allen, 321; *Reeves v. Webster*, 71 Ill. 307; *Thompson v. O'Sullivan*, 6 Allen, 304; *Baxter v. Knowles*, 12 Allen, 114. There was not sufficient change of possession. *Smith v. Hewett*, 13 Ia. 94; *McAfee v. Busby*, 69 Ia. 328; *Wheeler v. Selden*, 63 Vt. 429; *Weeks v. Prescott*, 53 Vt. 57; *Flanagan v. Wood*, 33 Vt. 332; *Brown v. Amsden*, 47 Vt. 569.

It was error to allow plaintiff to testify that the piano was insured in her name. 2 Jones on Ev., s. 300, 301; *Adams v. Hikcox*, 55 Ia. 632; *Tuckwood v. Hanthorn*, 67 Wis. 326;

Way v. Holton, 67 Vt. 184; *Bridgman v. Corey's Est.*, 62 Vt. 1.

The evidence relative to the keeping of a house girl was immaterial.

B. E. Bullard for the plaintiff.

Gifts from husband to wife, when not in fraud of creditors, are sustained. *Fisher v. Williams*, 56 Vt. 586; *Warner v. Dove*, 33 Md. 579; *Glaze v. Blake*, 56 Ala. 379.

No delivery from the husband to the wife was necessary, because the husband never had the goods to deliver. *Lee v. Mathews*, 10 Ala. 682; *Fletcher v. Fletcher*, 55 Vt. 325.

The evidence relative to the insurance had a tendency to prove that the property had been treated as the wife's property, and was material and competent. *Hill v. Fouse*, 32 Neb. 637.

START, J. The defendant's motion for a verdict raises the question of whether a husband can make a valid gift of personal property to his wife, as against creditors of the husband who became such after the gift. By No. 21, Acts of 1867, a married woman was authorized to hold to her sole and separate use all personal property and rights of personal action acquired by her during coverture by inheritance or distribution. This right to hold separate personal estate was, by No. 140, Acts of 1884, enlarged so that she could hold all personal property and rights of action acquired before or during coverture, except those acquired by her personal industry or by gift from her husband; and by No. 84, Acts of 1888, the exception of property acquired by her personal industry was removed. V. S. 2647. The words "except by gift from her husband," found in this statute, do not, by implication, have the force of an enactment prohibiting a married woman

from holding personal property which comes to her by gift from her husband, but leave her rights respecting such property as they were under the common law, before the enactment of any statute relating to the separate estate of a married woman. *Dewey v. St. Albans Trust Co.*, 57 Vt. 332; *State v. Shaw*, 73 Vt. 149, 50 Atl. 863; *Yatter v. Smilie*, 72 Vt. 349, 47 Atl. 1070; *State v. Martin*, 68 Vt. 93, 34 Atl. 40.

This brings us to the consideration of the question of whether a married woman can hold personal property given to her by her husband, under the common law as interpreted by our Court, when the rights of creditors of the husband, at the time of the gift, are not involved. In *Cardell v. Ryder*, 35 Vt. 47, the Court in giving effect to an agreement between husband and wife respecting property, said: "An agreement made during coverture may be enforced in equity even in case of a gift from the husband to the wife, if it is so far carried into effect as to separate the property from the residue of the husband's estate and place it in the name or exclusive control of the wife." In *Fisher v. Williams*, 56 Vt. 586, the Court, in an action at law, held that a husband could give his wife a demand for boarding a teacher, and in doing so, said: "The husband had the right to make a gift of any of his personal property to his wife to any amount except as against his then existing creditors." In *Bent v. Bent*, 44 Vt. 555, the Court, in holding that a husband could make a valid gift of a gold chain to his wife, said: "The law is well settled in this State, that the husband may surrender to the wife the right to her personal property which the law gives him by reason of the marriage; that he may do this by ante-nuptial contract to that effect, by allowing her to claim and control for a long time property given her during the coverture as her separate property, and refraining to exercise the right which the law gives him

to take from her such property and use it as his own, and by making gifts himself to the wife." In *Child v. Pearl*, 43 Vt. 224, the Court, in holding, in an action at law, that the plaintiff could recover for a mare and colt given to her by her first husband, and sold to the defendant by her second husband, said: "It is conceded, as it may well be, in view of the doctrine and rule established in many decided cases, that the husband may, during coverture, make a valid gift to the wife, by which she will become the owner, in her own separate right, of personal property." In *Richardson v. Estate of Merrill*, 32 Vt. 27, the Court, in holding that a wife could hold property which was the result of gift, inheritance or her personal earnings, said: "In every such case she will hold against the husband and his heirs, and generally against his creditors, so long as the husband allows the wife to keep the property separate from the general mass of his own estate, although his own name may be used in the formal conduct of the business, unless in the case of creditors this may lead to a false credit on the part of the husband." In view of these holdings, it is considered, that, in this jurisdiction, the law is settled that a married woman may hold personal property which comes to her by gift from her husband, as against creditors of the husband who becomes such subsequent to the gift.

The defendant also moved for a verdict on the ground that there was no such change of possession of the piano from the husband to the wife as to put it beyond the reach of the attaching creditor. It was in evidence that the husband and wife made an arrangement whereby she was to receive from him four dollars per week for one year, to dispose of as she pleased. Payments were made under this arrangement until the wife had one hundred sixty-two dollars in money. This sum she loaned to her husband. The wife inspected, tried

and selected the piano, and had negotiations with the salesman which resulted in the purchase of the piano for two hundred twenty-five dollars, the husband paying therefor under an arrangement that he should do so in discharge of the loan so made by his wife to him, and of the amount unpaid under the first arrangement, and that the piano should be her property. Before the piano was paid for, it was delivered at the house occupied by the husband and wife, and there set up to her satisfaction, she being there at the time and her husband at his office. This evidence tended to show that the husband never owned the piano, and the issue presented by it was for the jury; and, if found in favor of the plaintiff, it followed that the husband, as owner, never had possession of the piano. Such being the tendency of the evidence, and the effect of a finding therefrom being that the husband never became the owner of the piano, the motion was rightfully denied. *Ridout v. Burton*, 27 Vt. 383; *Paris v. Vail*, 18 Vt. 277; *Ross v. Draper*, 55 Vt. 404, 45 Am. Rep. 624.

The defendant requested an instruction that, if the jury found that the husband intended to give the piano to his wife, then there had been no such delivery of it to the wife as put it beyond the reach of the attaching creditor. The exceptions show that certain evidence was introduced by the plaintiff, but there is nothing in the record from which it appears that there was not other evidence upon this subject; therefore we cannot say that, if there was a gift of the piano, it was not followed by a delivery. The evidence, so far as it is recited in the exceptions, is not inconsistent with such a delivery. For aught that appears, the piano may have been taken to the house by the procurement of the wife and the gift preceded such taking. We cannot, for the purpose of finding error, assume that such fact did not appear. *Brooks v. Guyer*, 67 Vt. 669.

Subject to the defendant's exception, the plaintiff was allowed to testify that the piano was insured in her name. Upon the issues of possession and ownership, the manner in which the piano was treated by the husband and wife, and their acts respecting it, were relevant. *Stanley v. Robbins*, 36 Vt. 422; *Ross v. Draper*, 55 Vt. 404, 45 Am. Rep. 624. If there was evidence tending to show that the piano was thus insured with the knowledge and acquiescence of the husband, the evidence was admissible. We cannot assume that such evidence was not before the Court; therefore, error does not appear. *Tenney v. Smith*, 63 Vt. 520, 22 Atl. 659.

The plaintiff was allowed to testify, subject to the defendant's exception, that before going to Woodbury she kept a house girl, but thereafter had none. The defendant does not claim that he was in any way prejudiced by the evidence. His only claim is that it was immaterial. Immateriality alone, of testimony, is not a ground for reversing a judgment. To warrant a reversal, the evidence must be of a character likely to prejudice the excepting party in the decision of a material issue involved in the trial. *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 31 Am. Rep. 666. We think it clear that the trifling information communicated by the evidence respecting the plaintiff's domestic affairs, could not have prejudiced the defendant; and, for this reason, the exception is not sustained.

Judgment affirmed.

NELSON BROWN'S EXR. v. J. C. DUNN'S EST.

January Term, 1903.

Present: START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed May 6, 1903.

*Executor—Contract—Validity—Contingent claim—
Variance.*

When the executor of an estate, the principal assets of which consist of a note which such executor is liable to pay, enters into a contract with his surety, by the terms of which such surety agrees to pay the interest on certain money received from such executor, as security for his liability, to the executor during the life of the testator's widow, and, at her decease, to pay the principal sum to the executor of the testator's estate, it is error, in the trial of an appeal from the disallowance of the claim by such executor for such principal sum by the commissioners of such surety's estate, to order a verdict for the defendant.

Such claim is absolute and provable, though the time of payment has not arrived.

That the time of payment is uncertain does not make a claim contingent within the meaning of V. S. 2517, when the time of payment is sure to arrive.

Since it does not appear that the question of a variance between the declaration and the evidence was raised in, and passed upon by, the Court below, or that such variance was material and substantial, affecting the right of the matter, it is not considered here.

APPEAL FROM COMMISSIONERS. Declaration in the common counts. Plea, the general issue. Trial by jury at the March Term, 1901, Rutland County, *Munson*, J., presiding. Judgment for defendant on verdict ordered. The plaintiff excepted.

Joel C. Baker for the plaintiff.

If the notes against A. C. Bates & Son were a part of Nelson Brown's estate it was the duty of this executor to collect them, and if, through his neglect, he fails to do so, his bondsmen would be liable. *Lyon v. Osgood*, 58 Vt. 707. The money paid to Mr. Dunn is held for the payment of the notes, and the claim against his estate is presented by the proper party.

If the notes belong to Nelson Brown's widow, the method of recovery would be the same, as the contract is to pay to Nelson Brown's executor.

It is no objection that the time of payment has not elapsed. The claim is not contingent, since the time of payment must occur sometime. The administrator of the Dunn estate can pay at the time specified in the contract. V. S. 2428.

Lawrence & Lawrence, Butler & Moloney, and *F. S. Platt* for the defendant.

The contract was in the name of A. C. Bates. There is no evidence that any of the money received by Dunn belonged to the estate of Nelson Brown. The evidence shows that the money was received on account of the Nancy Brown note, or as the money of A. C. Bates.

There was clearly a variance between the declaration and the testimony. The declaration should have been on the contract.

The claim is contingent and not one that can be allowed by commissioners.

START, J. This is an appeal from the decision of commissioners upon the estate of James C. Dunn. The contention is over the liability of Dunn's estate to Amos C. Bates, as executor of the estate of Nelson Brown, for money claimed to

have been paid to Dunn by Bates. At the close of the plaintiff's evidence, the Court ordered a verdict for the defendant. This was error. The evidence tended to show that Amos C. Bates was executor of the estate of Nelson Brown, and as such executor was required to give a new bond; that the personal assets of the estate principally consisted of promissory notes for the sum of forty-two hundred dollars, signed by A. C. Bates & Son, and payable to Nancy F. Brown, widow of Nelson Brown; that these notes were charged to Bates in his account as such executor; that Bates, as a member of the firm of Bates & Son, was holden for their payment; that the estate could not be settled until the decease of Mrs. Brown; that Bates asked Dunn and Joel C. Baker to become sureties upon his bond; that Baker told Dunn they ought not to sign a bond whereby they would, in effect, become sureties for the payment of A. C. Bates & Son's notes, which were then understood as belonging to, and to constitute the principal personal assets of the estate; that Dunn told Bates that he felt that the bondsmen ought to be secured; and that Bates thereupon made and submitted to Dunn, in writing, the following proposition: "In consideration of J. C. Dunn signing A. C. Bates' bond, with others, as executor of the estate of Nelson Brown, I, A. C. Bates, agree to lend to J. C. Dunn the sum of forty-two hundred dollars in such sums and at such times as I can spare the money, but all of the above amount shall be paid in on or before four years from this date, April 13, 1886. Interest to be paid on all sums paid in from date, except eight hundred dollars this day paid in. No interest on this until the forty-two hundred has all been paid in. The interest paid to A. C. Bates during the life of Mrs. Nelson Brown, at her death all

the money above mentioned is to be paid to the executor of Nelson Brown's estate.

(Signed) Amos C. Bates, Executor."

The evidence further tended to show that this proposition was accepted by Dunn, and that, under it, he signed the bond and Bates paid to him various sums of money.

If the notes of Bates & Son were assets of the estate of Brown, on the decease of Mrs. Brown, Bates, as executor, would be held accountable for them; and if any loss came to the estate by reason of his failure to collect them, when by reasonable attention and diligence he might have done so, his bondsmen would be holden for his neglect. Bates being the executor of the estate, as such he could contract for the payment of money to the executor of the estate, provided he contracted with reference to his own assets or those of the estate. He could, in view of his liability for the payment of the notes and the duty he was under as executor to account for them, pay his own money to Dunn and stipulate for its payment by Dunn to the executor of the estate, on the decease of Mrs. Brown; and Dunn, by contract with Bates as executor, could bind himself to thus receive and pay over the money, and thereby secure indemnity for the liability he was assuming by signing Bates' bond. The evidence tended to show that the contract was made with reference to such liability on the part of Bates and the sureties upon his bond. From the facts and circumstances disclosed by the evidence, the jury might have properly found, if the case had been submitted to them, that the contract was entered into and payments made under a mutual belief that the notes belonged to the estate, and that the sureties upon Bates' bond would be holden for any shortage of duty on his part respecting them; that the contract was concluded and payments made with reference to such ownership and liability; that

Bates paid the money to Dunn in consideration of Dunn's promise to pay it to the executor of the estate, on the decease of Mrs. Brown; that Bates, in doing this, was providing for the payment of notes that were held by him as executor, and placing himself in a situation to properly account for them; and that Dunn promised Bates, as executor of the estate, that he would pay over to the executor of Brown's estate, on the decease of Mrs. Brown, all sums of money that should be paid to him by Bates under the contract. If the parties contracted with reference to the notes being assets of the estate and Bates' liability to account for them as executor, or his liability as one of the makers for their payment, then, for the purpose of determining the liability of Dunn's estate to Bates, as executor, the question whether the notes belonged to the estate of Brown or to Mrs. Brown, and whether the money paid by Bates to Dunn was an asset of Brown's estate, while in the hands of Bates and before it was paid to Dunn, were immaterial; and the claim could be presented to, and allowed by, the commissioners in the name of Bates, as executor of Brown's estate. *Davenport v. Mutual Life Association*, 47 Vt. 528; *Clark v. Employers' Liability Assurance Co.*, 72 Vt. 464; *Phelps v. Conant*, 30 Vt. 277; *Bank v. Burton*, 58 Vt. 426; *Rutland & Burlington R. Co. v. Cole*, 24 Vt. 33; *Pangborn v. Saxton*, 11 Vt. 79; *McPeck v. Moore*, 51 Vt. 269; 15 Ency. Pl. & Pr. 509.

The evidence also tended to show an absolute debt in favor of the claimant, provable before the commissioners under V. S. 2428, which provides, in part, for the allowance by commissioners of demands payable at a future day at their present value, and that, notwithstanding such allowance, the executor or administrator may pay the debt according to the terms and at the time specified in the contract. Dunn's undertaking, if any, was to pay at the decease of Mrs. Brown, an event which

was sure to occur sooner or later. This was an absolute undertaking to pay. His liability was not made to depend upon some future event which might or might not happen. The fact that the time of payment is uncertain does not make a claim contingent, when, as in this case, the time of payment is sure to arrive at some future day. A contingent claim, within the meaning of V. S. 2517, is one that cannot be proved as a debt before the commissioners, or allowed by them, because the liability is dependent upon some future event which may or may not happen, and therefore cannot be determined within the time allowed for proving claims before the commissioners. *Sargent v. Kimball*, 37 Vt. 321; *Curley v. Hand's Estate*, 53 Vt. 524.

It does not appear that the question of variance between the declaration and the evidence was raised in, and passed upon by, the Court below, nor does it appear that such variance is material and substantial, affecting the right of the matter; therefore, the question cannot be considered by this Court. V. S. 1630; *Bank v. Burton*, 58 Vt. 426; *Shanks v. Whitney*, 66 Vt. 405; *Dano v. Sessions*, 65 Vt. 79.

Judgment reversed and cause remanded.

CHARLES W. PORTER'S ADMRX. v. JOSEPH A. SHATTUCK'S
EST.

January Term, 1903.

Present: TYLER, MUNSON, STAET, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed May 6, 1903.

Mortgage note—Interest—Recovery of—Statute of Limitations.

An action for the interest on a mortgage note is barred by the Statute of Limitations when an action for the principal is so barred.

APPEAL FROM COMMISSIONERS. Declaration, general and special assumpsit. Pleas, the general issue and Statute of Limitations. Trial by Court at the December Term, 1902, Windsor County, Rowell, C. J., presiding. *Pro forma* judgment for defendant. The plaintiff excepted.

Edward H. Deawitt for the plaintiff.

A note secured by real estate mortgage has vitality for fifteen years, although the remedy on the principal is barred. The interest which accrued within six years and thirty days of the death of the maker of the note, is a valid obligation, for the mortgagor is not entitled to his land until he has paid this interest. Actions of assumpsit to recover interest may be maintained separate from an action for the principal. *Verney v. Iddings*, 18 E. C. L. 607; *McClure v. Cole*, 6 Blatch. (Ind.) 290; *Stone v. Bennett*, 8 Mo. 41; *Society v. Wells*, 68 Me. 572; 11 Ency. Pl. & Pr. 437, 438; *Hotel Co. v. Bailey*, 64 Vt. 151.

All installments of interest accruing within six years of the commencement of the suit are collectable if they accrued within the fifteen year period. *Burton v. Stevens*, 24 Vt. 131;

Stearns v. Stearns, 32 Vt. 678; *Montgomery v. Edwards*, 46 Vt. 151; *Gay v. Hassam*, 64 Vt. 495; *Phelps v. Wood*, 12 Vt. 256; *Blake v. Parleman*, 13 Vt. 574; *Noyes v. Hall's Est.*, 28 Vt. 645; *Green v. Seymour*, 59 Vt. 459; *Trust Co. v. Sheldon*, 68 Vt. 259; *Bridges v. Stephens*, 132 Mo. 524; 33 Cent. Dig. 201, 203.

William E. Johnson for the defendant.

The note outlawed February 21, 1895. If the plaintiff's claim is sound, the maker of a note is liable for interest as long as he lives.

The interest is regarded as an incident to the debt. *Ferry v. Ferry*, 2 Cush. 99; *Bank v. Doe*, 19 Vt. 463. In principle, these cases are decisive of this case.

START, J. The question is whether the Statute of Limitations bars an action for the recovery of interest that accrues on a promissory note secured by mortgage on realty and payable on demand, with interest annually, after the right of action for the recovery of the principal is barred by the statute. The claimant contends that inasmuch as the mortgagee could recover the possession of the mortgaged premises in an action of ejectment or foreclosure proceedings, at any time within fifteen years after the mortgage debt became due, unless the mortgagor paid the mortgage debt within the time fixed by the Court, and inasmuch as the mortgagor, in order to redeem the premises, must pay the mortgage note, with interest, according to the terms, the right of action for the recovery of interest that accrues is not barred by the Statute of Limitations so long as the right of action for the recovery of the possession of the mortgaged premises continues, and that the mortgagor is estopped from availing himself of the statute.

The mortgagee's right to maintain an action at law, or in equity, for the recovery of the possession of the mortgaged premises is in no way dependent upon whether the mortgagor's personal liability for the payment of the mortgage debt is barred by the statute, but upon his continued ownership of the premises, subject to the mortgagor's equity of redemption; nor is the mortgagor's right to redeem the premises dependent upon whether he is personally liable for the mortgage debt. The right attaches to, and may be exercised by, the owner of the equity of redemption, irrespective of whether he is, or ever has been, personally holden for the payment of the mortgage debt. Therefore, the right to maintain a real action for the possession of the premises is not determinative of the right to maintain a personal action against the mortgagor for the recovery of the mortgage debt. In *Houghton v. Tolman*, 74 Vt. 467, 52 Atl. 1032, it is held that a note secured by mortgage upon realty is within the statute of limiting actions of assumpsit founded on contract, express or implied, to six years after the cause of action accrues. In that case it is said that a mortgagee has two distinct remedies, one upon the note, barred in six or fourteen years, according to whether the note is witnessed or not, and one upon the mortgage, barred in fifteen years, in analogy to the statute barring the right of entry into houses and lands in that time, and that the loss, for any reason, of either of these remedies, does not affect the other, if the debt remains unpaid.

Interest accruing upon a promissory note is regarded as an incident of the principal of the note, and when this is barred by the statute, no recovery can be had for interest that thereafter accrues. In *Bank v. Doe*, 19 Vt. 463, 47 Am. Dec. 697, the Court, in holding that interest that becomes due yearly upon a promissory note is not barred so long as the right of

action for the principal continues, said: "The statute does not begin to run upon the demand until the principal, or at least some separate and distinct portion of the principal, becomes due and payable, and then only upon such distinct and separate portions. The accruing interest from year to year is not thus separated from the principal demand; and consequently the Statute of Limitations does not run upon it, until the principal is barred by the statute."

Judgment affirmed.

MARTHA HANKS v. CARLTON HANKS, LENORA HANKS, and
NORMAN D. MOORE.

January Term, 1903.

Present: TYLER, MUNSON, STANT, WATSON and HASELTON, JJ.

Opinion filed May 6, 1903.

Equity—Jurisdiction.

Chancery has jurisdiction over the avails of property conveyed in fraud of the orator's rights as a creditor, to keep the same within this jurisdiction, that they may be available for the satisfaction of any judgment the orator may obtain in any action pending at law, and will continue an injunction on such avails for a reasonable time for the orator to obtain such judgment, and apply them to the payment of such judgment, if obtained.

If the orator, after such injunction is granted, in good faith discontinues such action at law, believing it is necessary so to do to obtain satisfaction, the Court of Chancery will hear and determine the matter, if the circumstances are such that another action at law cannot be made available.

APPEAL IN CHANCERY. Heard on defendant's demurrer to the bill, at the June Term, 1902, Addison County, *Stafford*, Chancellor. Demurrer overruled, *pro forma*, and the bill adjudged sufficient. The defendants appealed.

W. H. Davis for the defendants.

The orator has an action for the breach of the contract and cannot invoke the aid of a Court of Equity. *Currier v. Rosenbrook*, 48 Vt. 34; *Smith v. Pettengill*, 15 Vt. 83.

The defendants are entitled to a trial by jury on the question whether there has been a breach of the contract. *Scott v. Neely*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451; *Coal Co. v. Snowden*, 42 Pa. St. 488; *Donahue v. Miester*, 88 Cal. 121; *Wiggins v. Williams*, 36 Fla. 637; *Skeele v. Stanwood*, 33 Me. 307.

J. H. LaFleur and *W. H. Bliss* for the oratrix.

The bill sets forth a complete equitable case on the ground of fraud. 1 Story Eq. s. 184; *Conant v. Jackson*, 16 Vt. 335; *Hoyt v. Dewey*, 50 Vt. 465; *Smith v. Scribner*, 59 Vt. 96; *Harrington v. Grant*, 54 Vt. 236.

The Court of equity will lay hold on and retain this fund. *Adams Eq.*, 310. And since the oratrix now has no other remedy, this Court must retain jurisdiction in order that full and complete justice may be done. 1 Story Eq., s. 33; *Freeholders v. Bank*, 48 N. J. Eq. 51; *Richardson v. Railroad Co.*, 44 Vt. 613; 11 Enc. Law, 200; 18 Enc. Pl. & Pr. 110.

START, J. The bill cannot be maintained on the ground that the contract between the mother and son was entered into with a fraudulent intent on the part of the son to cheat and defraud the mother. The allegations do not tend to show

that the contract was induced by false and fraudulent representations, or that an undue advantage was taken of the mother's age, circumstances and situation, or that the son did not receive the mother's property, and in consideration thereof, in good faith, promise to support her during the remainder of her life; nor can the bill be maintained on the ground that the son received the money to hold in trust for the mother. He received it as a consideration for his agreement to support the mother, and the mother received therefor the right to have and demand such support. But the bill can be maintained on other grounds. It shows that process cannot be served upon the son, for the reason that he has absconded from the State, leaving no property within this State; that the mother brought an action at law, and caused the son's arrest therein as an absconding debtor; that defendant Moore became bail for the son's appearance; that defendant Lenora Hanks placed the sum of eight hundred dollars in the hands of Moore to indemnify him as such bail, that on granting an injunction restraining Moore from paying said money over to either of the other defendants, the mother will discontinue her action at law, and thereby relieve Moore from the liability he is under as bail for the appearance of the son; that the son owned a farm valued at twenty-two hundred dollars and mortgaged for five hundred dollars; that the farm and some personal property thereon constituted all of the available property of the son; that the son, without consideration, through a third party, conveyed the farm to his wife, defendant Lenora Hanks, in fraud of the mother's rights as a creditor of the son; that Lenora Hanks sold the farm and received seventeen hundred dollars therefor, and removed from the State, leaving no property in this State, except the money so placed in the hands of defendant Moore; that the money now in the hands of Moore is a

part of the proceeds of the sale of the farm of Lenora Hanks; that said money cannot be reached by an action in a court of law; and that the mother is left without means of support.

By these allegations, the oratrix makes a case over which the Court of Chancery has jurisdiction. If her action at law is still pending, chancery has jurisdiction for the purpose of keeping the proceeds of the farm, which it is claimed was conveyed in fraud of the oratrix's rights as a creditor of defendant Carlton Hanks, where they will be available for the purpose of satisfying the oratrix's debt, if any she has against him, when the same shall be established by a judgment in the action at law. It also has jurisdiction if it is found by the Court of Chancery that the farm was conveyed in fraud of the rights of the oratrix, and that defendant Moore holds the proceeds thereof, to appropriate such proceeds to the payment of the judgment, if one is obtained. Therefore, the cause and the injunction order therein should be retained for such time as the Court of Chancery shall consider a reasonable time for the oratrix to establish her debt, if any she has, by a judgment in her action at law; and if she does so within such time, the Court of Chancery should proceed with the cause and if it is found that the farm was conveyed in fraud of the oratrix's rights as a creditor of defendant Carlton Hanks, and that the proceeds thereof are, in part, in the hands of defendant Moore, decree satisfaction of the judgment out of such proceeds. *Griffith v. Hilliard*, 64 Vt. 643; *Missionary Society v. Eells*, 68 Vt. 497.

Defendant Carlton Hanks, having removed from the State, is beyond the reach of the process of the Courts of this State; therefore, the oratrix cannot now obtain a judgment against him in a court of law, unless her action heretofore brought in the law court is still pending. If that action has

been discontinued, and defendant Carlton Hanks has no property in this State, the oratrix cannot obtain satisfaction for the claimed breach of contract for her support in the law courts of this State; and the Court of Chancery has jurisdiction of all the matters alleged in the oratrix's bill, and may ascertain whether there has been a breach of the alleged contract, and, if so, the damages resulting therefrom, and decree satisfaction thereof out of the proceeds of real estate found to have been conveyed in fraud of the oratrix's rights, and now in the hands of defendant Moore; provided the oratrix, in discontinuing her action at law, acted in good faith, believing it was necessary to do so in order to obtain satisfaction for the claimed breach of the alleged contract out of the money in the hands of defendant Moore. *Bank v. Paine*, 13 R. I. 592; *Pendleton v. Perkins*, 49 Mo. 565; *Overmire v. Haworth*, 48 Minn. 373; Bump on Fraudulent Conveyances, § 549; 14 Ency. of Law, (2 ed.) 318.

The pro forma decree is affirmed and cause remanded.

STATE v. ALBERT SHEDROI.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed May 16, 1903.

Peddler's license—Constitutional law—Equality clause—Class legislation—V. S. 4732, 4733.

The discrimination made in V. S. 4733, in favor of honorably discharged soldiers, is unreasonable and arbitrary, and therefore unconstitutional, and renders V. S. 4732 unconstitutional.

INFORMATION for peddling without a license. Heard on a demurrer to the information, at the December Term, 1902, Caledonia County, *Watson*, J., presiding. Demurrer overruled, *pro forma*, and information adjudged sufficient. The respondent excepted.

G. C. Frye for the respondent.

The statute upon which this information is based is unconstitutional. It denies to the respondent the equal protection of the law. *Butcher's Union v. Crescent City Co.*, 111 U. S. 746, and cases cited (d). *State v. Hoyt*, 71 Vt. 59; *State v. Cadigan*, 73 Vt. 245. The statute, although composed of several sections, is on entire law. *Ryegate v. Wardsboro*, 30 Vt. 746; *Warren v. Mayor, etc.*, 2 Gray, 84; *People v. Porter*, 90 N. Y. 68; *Dells v. Canada*, 49 Wis. 55.

M. G. Morse, State's Attorney, for the State.

The Legislature may impose a license upon one occupation and not upon another, so long as no discrimination is made among those engaged in the occupation taxed. *State v. Hodgson*, 66 Vt. 134; *State v. Harrington*, 68 Vt. 622.

The act should not be held unconstitutional as a whole. Black on Interp. 96, and cases cited.

WATSON, J. The respondent is informed against for becoming a peddler without a license in force, under the provisions of V. S. c. 198, as amended by No. 94, Acts of 1900, and the case is here upon demurrer to the information. It is contended that the law upon which this information is based is in conflict with the 14th Amendment to the Constitution of the United States.

That the license fee required to be paid under the provisions of this chapter for the privilege of selling goods as a peddler is a tax upon the goods themselves, was determined by this Court in *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973. In that case, the law was held to discriminate unjustly against goods manufactured in this State, and for that reason unconstitutional. Later the law was so amended as to avoid such discrimination. Acts of 1900, No. 94.

V. S. 4732 provides that a person who becomes a peddler without a license in force, as provided in that chapter (198) shall be fined not more than three hundred dollars, and not less than fifty dollars.

By V. S. 4733, persons resident of this State who served as soldiers in the war for the suppression of the Rebellion in the Southern States, and were honorably discharged, are exempt from the payment of a license tax under the provisions of that chapter. It is urged that herein the law unjustly discriminates in favor of such soldiers and against other persons, by reason of which it is in violation of the 14th Amendment, whereby no State can "deny to any person within its jurisdiction the equal protection of the laws."

Can such an exemption be made by the Legislature without affecting the validity of the general provisions of that chapter, is the question.

In *Bell's Gap R. R. Co. v. Penn.* 134 U. S. 232, 33 L. Ed. 892, speaking through Mr. Justice BRADLEY, the Court said: "The provision of the 14th Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of

charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impossible and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think we are safe in saying that the 14th Amendment was not intended to compel a State to adopt any iron rule of equal taxation." And in *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, the Court, speaking through Mr. Justice FIELD, said this Amendment "in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of

wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." And in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, it is said that the rule only prescribes that the "law have the attribute of equality of operation; and equality of operation does not mean indiscriminate operation on persons merely, as such, but on persons according to their relation." Such is the rule laid down by this Court in *State v. Hoyt*, above cited. It was there held that the mere fact of classification is not enough to exempt the operation of the statute from the equality clause of the Constitution, but that it must also appear that the classification made is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.

By the law in question, the Legislature has made a classification by placing persons resident of the State, who served as soldiers in the Civil War, and were honorably discharged, in one class, and all other citizens together in another class. All persons engaged in the business of peddling, whether they belong to the one class or the other, must have a license in force, or be subject to a penalty; but a license tax is required to be paid by persons in the latter class, while a license may be had by all in the former class without the payment of such tax. The classification, therefore, is one of taxation. From one class a tax on their goods authorized so to be sold is exacted for the privilege of doing business as a peddler, while the other

class may carry on the same business in the same manner, sell the same kind and quality of goods in the same territory, without payment of such tax.

Does this classification have the equality of indiscriminate operation on all persons licensed thus to do business according to their relations? Upon the answer to this question's being in the affirmative or in the negative depends the validity or the invalidity of the law in question under the equality clause of the 14th Amendment.

Upon what basis does the attempted classification rest? There is no basis upon which it can rest except that persons in the one class served as soldiers in the Civil War and were honorably discharged, and those of the other class did not so serve, or were not honorably discharged. This classification is dependent solely on a condition of things long since past, and not on a present situation or condition, nor on a substantial distinction having reference to the subject matter of the law enacted. The veterans were originally from no particular class, and when discharged from the army, they returned to no particular class,—they again became a part of the general mass of mankind, with the same constitutional rights, privileges, immunities, burdens and responsibilities as other citizens similarly circumstanced in law, in the same jurisdiction.

Assuming that thus to have served as a soldier and to have received an honorable discharge may well merit reasonable considerations at the hands of the State in recognition of patriotism and valor in defense of a common country, yet such considerations cannot exceed those constitutional limits established for the welfare and protection of the whole; for equal protection of the laws requires "that all persons subjected to such legislation shall be treated alike under like circumstances

and conditions, both in the privileges conferred and liabilities imposed." *Magoun v. Bank*, above cited.

It cannot be said that service as a soldier in the Civil War and the receipt of an honorable discharge bear any relation to the business of a peddler as defined by the law under consideration. There is no difference between the present conditions and circumstances of such veterans and those of other citizens regarding the relations to the law or the attempted classification. In fact, according to their relations, they are of the same class, and any attempted classification between them is but a mere arbitrary selection, and based upon no reasonable grounds.

In *State v. Hoyt*, referring to the equality clause, it is said that it is enough if there is no discrimination in favor of one against another of the same class; but that, when such discrimination exists, it impairs that equal right which all can claim in the enforcement of the laws. And the cases of *State v. Harrington*, 68 Vt. 623, 35 Atl. 515, 34 L. R. A. 100, and *State v. Cadigan*, 73 Vt. 245, 50 Atl. 1079, 57 L. R. A. 666, are much in point. In the former, the respondent was charged with selling and exposing for sale goods, wares, and merchandise as an "itinerant vendor," without a license therefor. It was contended upon demurrer to the information that the law upon which the prosecution was based discriminated between itinerant vendors and resident vendors, and between classes of itinerant vendors, and therefore it was in conflict with both the State and Federal Constitutions. It was held that the State might require a license fee from persons in one occupation, and not from those in another, provided no discrimination was made between those of the same class. In the latter case, the respondent was charged with acting as agent of a partnership organized under the laws of the State of New York in selling certain municipal bonds here without the

partnership having procured a license from the Inspector of Finance, etc., as required by the laws of this State. It was held that to discriminate between residents of our own State by denying to one class the privilege of transacting business without complying with conditions and exactions not required of others, when the ground of classification is wholly fanciful and arbitrary, is a denial of the equal protection of the laws.

The constitutional right of a State Legislature to discriminate in favor of persons who served in the army or navy of the United States in the Civil War, has been before the Court of last resort in several of the sister States. In New York, the Constitution provides that appointments and promotions in the civil service "shall be made according to merit and fitness, to be ascertained so far as practicable by examinations which, so far as practicable, shall be competitive." In the matter of *Keymer*, 148 N. Y. 219, 35 L. R. A. 447, it was held that a provision of the civil service law in effect that as to honorably discharged soldiers and sailors of the Civil War competitive examinations should not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed four dollars per day was in conflict with the Constitution. And a somewhat similar law in Massachusetts, purporting absolutely to give veterans particular and exclusive privileges different from those of the community in obtaining public office, was held to be not within the constitutional power of the Legislature. *Brown v. Russell*, 166 Mass. 14, 32 L. R. A. 253.

In Iowa, the Constitution provides that "all laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall equally belong to all citizens." A statute requiring peddlers to pro-

cure a license and to pay a license tax contained the provision that the section requiring the payment of the tax should not be held to apply "to persons who have served in the Union army or navy." In *State v. Garbroski*, 111 Iowa, 496, 56 L. R. A. 570, it was contended that because of this immunity from the tax to peddlers who so served in the army or navy, the law was void. In an extended opinion reviewing many authorities, the Court, saying that the attempted classification is based on no apparent necessity or difference in condition or circumstances that have any relation to the employment in which the veteran of the Civil War is authorized to engage without paying license, and that it savors more of philanthropy than of reasonable discrimination based upon real or apparent fitness for the work to be done, held the law unconstitutional.

We think it clear that the discrimination made in the law in question, in favor of persons who served in the War of the Rebellion and were honorably discharged, is without reasonable ground and arbitrary, having no possible connection with the duties of the citizens as tax payers, and their exemption from the payment of the tax therein required of others exercising the same calling is pure favoritism, and a denial of the equal protection of the laws. It follows that section 4732 of the Vermont Statutes is unconstitutional and without force, and that section 4733 of the Vermont Statutes, so far as it relates to the payment of licenses required by said chapter 198, is unconstitutional and without force.

Pro forma judgment reversed, demurrer sustained, information adjudged insufficient and quashed, the respondent discharged and let go without day.

CHARLES R. DAVIS v. BOWERS GRANITE COMPANY.

January Term, 1903.

Present: TYLER, STARR, WATSON and HASELTON, JJ.

Opinion filed May 16, 1903.

Chattel mortgage—Contract—Non-performance—Conversion—Damages—Remittitur—Question for Court—Burden of proof.

In assessing damages for a conversion, it is proper for the jury to consider not only the value of the property at the time of the conversion, but also the time which has elapsed since.

The Court may allow a plaintiff to reduce his verdict by a *remittitur* to the sum declared for.

The consideration of the mortgage not being in question, evidence of the facts and circumstances resulting in its execution was properly excluded.

The construction of unambiguous written evidence is for the Court.

The positive refusal to accept goods in process of manufacture, by one party to an entire contract, excuses further performance or tender of performance by the other.

A defendant, who seeks to justify under a chattel mortgage sale, assumes the burden of proving a breach of the condition of the mortgage.

TRESPASS DE BONIS AND TROVER. Plea, the general issue and notice justifying under a chattel mortgage sale. Trial by jury at the December Term, 1901, Caledonia County, *Munson*, J., presiding. Defendant's motion for a verdict overruled. Verdict for plaintiff. Judgment on verdict after *remittitur* filed. The defendant excepted.

Senter & Senter for the defendant.

There was no evidence of any damage in excess of one hundred and eighty-five dollars. If the *remittitur* was to be

allowed, it should have been for all above that sum. *Tarbell v. Tarbell*, 60 Vt. 493.

The effect of the letters of July 10th and 14th was for the jury. The burden was upon the plaintiff, who took the affirmative. 25 Albany L. J. 125; 1 Wharton's Ev. 356.

Taylor & Dutton for the plaintiff.

It was proper for the Court to allow the plaintiff to remit that part of the verdict in excess of two hundred dollars. *Ray v. Harrington*, 58 Vt. 181; *Crampton v. Marble Co.*, 60 Vt. 291; *Tarbell v. Tarbell*, 60 Vt. 486; *Giffin v. Barr*, 60 Vt. 599; *Fletcher v. Fletcher*, 72 Vt. 268. The jury had a right to add to the one hundred and eighty-five dollars a sum equal to the interest. *Thrall v. Lathrop*, 30 Vt. 307; *Lindsey v. Danville*, 46 Vt. 144; *Clement v. Spear*, 56 Vt. 401; *Taylor v. Coolidge*, 64 Vt. 506. It will be presumed that the excess was interest. *Bridgman v. Hardwick*, 67 Vt. 653.

The question was whether the condition of the mortgage had been broken. The evidence offered by the defendant raised a collateral issue. Step. Dig. Ev., 24; Greenleaf on Ev., s. 52; *Clark v. Hays & Smith*, 72 Vt. 138; *Rowe v. Bird*, 48 Vt. 578; *Aiken v. Kennison*, 58 Vt. 665. The burden was on the defendant. *Shaw v. Peckett*, 25 Vt. 423; *Downing v. Roberts*, 21 Vt. 441; *Collamer v. Drury*, 16 Vt. 574; *Briggs v. Mason*, 31 Vt. 433; *Allen v. Parkhurst*, 10 Vt. 557.

The refusal of the defendant to accept the stone relieved the plaintiff from further performance. *Amsden v. Atwood*, 68 Vt. 322; *Pioux v. Brick Co.*, 72 Vt. 148; *Durfy v. Worcester*, 63 Vt. 418; *Danforth v. Walker*, 37 Vt. 239; *Durby v. Johnson*, 21 Vt. 17; *Nye v. Taggart*, 40 Vt. 295. The interpretation of the letters was for the Court. 1 Greenleaf on

Ev., s. 277; *Hodge v. Strong*, 10 Vt. 245; *Watson v. Rowe*, 16 Vt. 525; *Morse v. Weymouth*, 28 Vt. 824.

WATSON, J. This action is trespass *de bonis asportatis* with a count in trover for a horse and wagon. The *ad damnum* is two hundred dollars. The taking and conversion were on the third day of September, 1894. There was no evidence that the property was worth at the time of the conversion more than one hundred and eighty-five dollars, nor to show any damages in excess of that sum. The jury returned a verdict for the plaintiff to recover two hundred four dollars and five cents. After verdict and before judgment, the plaintiff was permitted to remit so much of the verdict as was in excess of two hundred dollars. The defendant moved that the verdict be set aside on the ground that it was not warranted by the evidence, and that it was in contradiction of it. After the plaintiff filed his *remittitur*, the defendant's motion was overruled and judgment rendered for the plaintiff for two hundred dollars. To this the defendant excepted, and thereon he now contends that, as there was no evidence of any damage in excess of one hundred and eighty-five dollars, the *remittitur*, if allowed, should have been for all in excess of that sum.

In assessing the damages, it was legitimate for the jury to consider not only the value of the property at the time of conversion, but also the time which had elapsed since the conversion, to determine the fair compensation to the plaintiff for his injury. *Clement v. Spear*, 56 Vt. 401. Under this rule it cannot be said that the damages found were not warranted by the evidence and circumstances of the case, but this action being one sounding merely in damages, the plaintiff could recover no greater sum than he had declared for. It was within the province of the Court to allow the plaintiff to reduce his

verdict to that sum by a *remittitur*, and then to render judgment accordingly. *Tarbell v. Tarbell*, 60 Vt. 486; *Crampton v. The Valido Marble Co.*, 60 Vt. 291, 1 L. R. A. 120.

The mortgage upon which the property in question was sold by the defendant's officer, together with the order referred to in the condition of the mortgage, designated as No. 8186, sent by the defendant to the plaintiff under date of December 13, 1893, were introduced in evidence. The consideration of the mortgage was not in question. If the condition of the mortgage had been broken, and thirty days had elapsed since the breach, the defendant had a right to sell the property upon the mortgage as he did. If the condition had not been broken, and such time elapsed, he had no right thus to sell it. Whether the condition had in fact been broken, depended upon the terms of the condition and the performance thereof by the plaintiff, and not upon the facts and circumstances resulting in the giving of the mortgage. Therefore, in excluding the evidence offered of such facts and circumstances, there was no error.

The plaintiff's evidence tended to show that the stock used by the plaintiff in cutting the four stones described in the condition of the mortgage was of the quality and kind specified in the contract, and that said stones were completed by him according to the terms of said contract, except the lettering and certain links to be cut on the die; and that as to these matters, defendant had directed plaintiff not to proceed until the stones were completed in all other respects ready for inspection; that, when the stones were completed except in these particulars, plaintiff notified defendant, whereupon defendant's manager inspected the stones; that defendant refused to accept the stones, claiming certain defects which the plaintiff's evidence tended to show did not exist; that by reason of this re-

fusal plaintiff suspended work on the stones; that the stones still remain in plaintiff's yard, and that plaintiff has always stood, and still stands ready to complete the work, and would have done so at that time but for the defendant's refusal to accept.

Letters written by the parties which had a bearing upon the question whether the plaintiff had satisfied the condition of the mortgage by performing his contract, were introduced in evidence. Of the letters so introduced there were two from the defendant to the plaintiff,—one dated July 10, 1894, and the other July 14, 1894. The Court charged the jury in part that the contract imposed in the condition of the mortgage was the entire contract, and the plaintiff could not satisfy the condition of the mortgage without fully completing the contract, unless he was excused from the full completion by some act of the defendant; but, if the stock furnished by the plaintiff was in accordance with the contract, and if the work to be done upon it was completed in accordance with the contract, except the cutting of the three links and the lettering, the positive declaration of the defendant in its letters of July 10 and July 14, above referred to, that it would not accept the "base," would excuse the plaintiff from further cutting and lettering the stone; so his failure to do this would not justify the foreclosure of the mortgage, nor prevent the plaintiff's recovering in this suit. To this portion of the charge the defendant excepted, claiming that, as there was nothing ambiguous about the letters, it was for the jury, and not for the Court, to say whether the plaintiff was warranted, from those letters, in neglecting to complete the job,—that as there was nothing ambiguous about them, it was a question of fact for the jury, and not one of law for the Court; and that, inasmuch as it was an entire contract, the plaintiff must have completed it;

that the evidence was conflicting, but it tended to show that the defendant only told the plaintiff that if he proceeded, he must proceed at his own risk.

The fact that these letters contained no ambiguity did not make them for the jury to construe. It is a general rule that the interpretation or construction of written instruments drawn in language so plain as not to require the aid of extrinsic evidence, is a question for the Court, and to submit such a question to the jury is error. 1 *Thomp. on Trials*, § 1065. See, also, *Smith Woolen Machine Co. v. Holden*, 73 Vt. 396, 51 Atl. 2; *Currier v. Robinson's Est.*, 61 Vt. 196, 18 Atl. 147; *Gove v. Downer*, 59 Vt. 139, 7 Atl. 463; *Wason v. Rowe*, 16 Vt. 525; *Mixer v. Williams*, 17 Vt. 457.

These two letters expressly state that the defendant will positively not accept the "base," hence in that regard they were properly construed by the Court. If the stock was such as the plaintiff was required to furnish, and the work to be done upon it by him was completed according to contract, except the cutting of the three links and the lettering, when he received these letters, the plaintiff was justified in stopping work. The contract set forth in the conditions of the mortgage was an entire contract, and incapable of severance. When the plaintiff received notice from the defendant that it would not accept the base to the monument, a part of the entire contract, it was in effect a notice that the defendant would not accept the stones specified in the conditions of the mortgage, according to contract. This shows that the non-completion of the contract was not the fault of the plaintiff, and that he was disposed and able to complete it had not the act of the defendant prevented. In that part of the charge excepted to there was no error; for such fault by the defendant should be removed before he can charge the plaintiff with a failure to perform. *Cort v. The Amber-*

gate etc. R'y. Co., 17 Q. B. 127; *Raynay v. Alexander*, Yelverton, 76.

It is urged, however, that it was the plaintiff's duty to have fulfilled the contract by completing the job and tendering it to the defendant. But if the defendant refused to accept the stones according to the contract, the law did not require of the plaintiff the useless ceremony of thus making a tender. *Hard v. Brown*, 18 Vt. 87; *Cobb v. Hall*, 33 Vt. 233.

The defendant requested the Court to charge that the burden of proof was upon the plaintiff to show that the work was completed according to the terms of the contract. This request was not complied with, but instead thereof, the Court charged that the burden of proof was upon the defendant to show there was a breach of the conditions of the mortgage. An exception was taken to the neglect to charge as requested, and to the charge as given in this behalf. To make out his case, the plaintiff need show no more than that the defendant committed the act which, in the absence of excuse or justification, constituted in law a tort to him. If facts existed which would justify the defendant in his act, even though they would show that he had committed no tort, such facts would constitute an affirmative defense, and the burden was upon the defendant to allege and prove them. Hence in the refusal thus to charge, and in the charge as given there was no error. *Bosworth v. Bancroft*, 74 Vt. 451, 52 Atl. 1050.

No other exceptions being relied on in the defendant's brief, *judgment is affirmed.*

STATE v. DON A. BISBEE.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON and STAFFORD, JJ.

Opinion filed May 16, 1903.

Adultery—Sufficiency of indictment—Motion in arrest.

An indictment for adultery which fails to allege that the *particeps* was a married or an unmarried woman is fatally defective. Such defect is not cured by verdict.

INDICTMENT for adultery. Plea, not guilty. Trial by jury at the December Term, 1902, Addison County, *Haselton*, J., presiding. Verdict, guilty. Respondent's motion in arrest of judgment overruled. Judgment on verdict. The respondent excepted.

Frank L. Fish and *W. H. Bliss* for the respondent.

The indictment should have charged that the woman was either married or unmarried. *State v. Searle*, 56 Vt. 516.

The indictment does not charge that the *particeps* was a woman. *Crawford v. Slye*, 4 Cranch, 457; *LaMotte v. Archer*, 4 E. D. S. (N. Y.) 46; 21 Enc. Law, 312.

The omission of the word "feloniously" is fatal. 1 Bish. Crim. Pro., 534; Heard's Cr. Pl., 153; 10 Enc. Pl. & Pr., 492; Arkansas, Delaware, Kentucky, Mississippi, Missouri, North Carolina, Pennsylvania, Texas, Virginia, and West Virginia uphold this rule. Tennessee and New Hampshire alone refuse to recognize it.

James B. Donoway, State's Attorney, for the State.

The indictment sets forth all the necessary elements of the crime. *State v. Northfield*, 13 Vt. 565; *State v. Rowell*, 70 Vt. 411; *United States v. Cruikshank*, 96 U. S. 542.

The omission to allege that the *particeps* was a woman was cured by the verdict. Bish. Crim. Pro., s. 707 a; *State v. Freeman*, 63 Vt. 496; *Dobson v. Campbell*, 1 Sumn. (U. S.) 326.

It was not necessary to charge that the *particeps* was either married or unmarried. It is sufficient if one of the parties is a married person. *State v. Hutchinson*, 36 Me. 261; *Commonwealth v. Reardon*, 6 Cush. 78.

WATSON, J. The respondent was tried and convicted of the crime of adultery. After verdict and before judgment, he moved in arrest of judgment for that, among other things, the indictment contains no allegations showing whether the *particeps criminis* was or was not an unmarried woman. Upon an exception to the overruling of this motion, the case is here.

To be guilty of the crime of adultery, under the provisions of V. S. 5055, a man must have sexual connection with a married woman other than his wife; and to constitute the crime under V. S. 5056, a married man must have sexual connection with an unmarried woman. The indictment is without any allegation that the *particeps criminis* was a married woman, hence it is insufficient under the former section; nor is it sufficient under the latter section, for it does not allege that she is an unmarried woman. This has been so held on demurrer to an indictment where the statutory provisions in these respects were the same as those contained in the sections above named. *State v. Searle*, 56 Vt. 516.

The indictment omits to allege an essential and material fact to constitute a crime under either section of the statute,

and it is not implied in nor inferable from the finding of the facts alleged, whether the alleged *particeps criminis* was a married or an unmarried woman. Hence it cannot be said that the jury must have found that she was either, rather than the other; therefore the defect is not cured by the verdict. *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633.

Judgment reversed, judgment arrested, all the proceedings are set aside, and judgment that the respondent be acquitted.

STATE v. ANDREW ROSENTHAL.

May Term, 1903.

Present: TYLER, MUNSON, STARR, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed May 30, 1903.

City ordinance—Carrying weapons—Validity.

Section 10 of the ordinances of the city of Rutland, so far as it relates to the carrying of a pistol, is repugnant to the Constitution and laws of the State, and void.

COMPLAINT for violation of an ordinance of the City of Rutland. Heard on respondent's demurrer to the complaint, in the Municipal Court of that city, *Howe*, Judge. Demurrer overruled *pro forma*, and complaint adjudged sufficient. The respondent excepted.

Joel C. Baker for the respondent.

The ordinance in question was passed under the general clause of the city charter, and not by special authority conferred. V. S. 4922, 4923, 4924, 4925 and 4926 cover the subject matter of carrying weapons in this State. The ordinance is inconsistent with, and repugnant to, these statutes, and therefore void. 1 Dil. Mun. Corp., s. 319; *Wood v. Brooklyn*, 14 Barb. 425; *Southport v. Ogden*, 23 Conn. 128; *Murphy v. Jacksonville*, 18 Fla. 318; *Robinson v. Mayor, etc.*, 1 Humphrey, 156; Note to 34 Am. Dec. 627.

The carrying of fire-arms for one's defense is a fundamental right of a citizen. The ordinance is repugnant to the Constitution. Constitution, ch. 1, s. 16; *Tiedman Mun. Corp.* s. 150; *Mayor, etc. v. Nichols*, 4 Hill. 209; *Commonwealth v. Turner*, 1 Cush. 493; *Newton v. Belger*, 143 Mass. 598; *Lossier v. Newark*, 48 N. J. L. 452.

Wm. H. Preston, State's Attorney, for the State.

Under the general provisions of the charter, the city may pass reasonable by-laws, upon all matters outside of those expressly granted, necessary for the well being of the city, not inconsistent with the Constitution and laws of the State. Dil. Mun. Corp., s. 316.

The Constitution gives the people a right to bear arms for the defense of themselves and the State. This by-law does not prevent one from carrying a pistol in defense, only it must not be concealed. 21 Minn. 201; Dil. Mun. Corp., s. 329, notes.

Nor is the by-law inconsistent with the laws of this State. It supersedes the existing general law on the subject. 59 Vt. 300; 31 Barb. 282; 38 Hunn. 82; 1 Wend. 237.

WATSON, J. Section 10 of the ordinances of the city of Rutland provides that no person shall carry within the city any steel or brass knuckles, pistol, slung-shot, stiletto, or weapon of similar character, nor carry any weapon concealed on his person, without permission of the mayor or chief of police, in writing, and for a violation thereof a penalty is provided by a subsequent section.

A complaint was filed against the respondent, in the City Court, for carrying within the city, in violation of said ordinance, a pistol loaded with powder and bullets, concealed on his person, without such permission.

On demurrer to the complaint, the respondent contends, among other things, that said ordinance is illegal, for that, so far as it forbids the carrying of a pistol, it is repugnant to and inconsistent with the Constitution and the laws of this State.

Section 24 of the city charter gives the city council power to make, establish, alter, amend, or repeal ordinances, regulations and by-laws, not inconsistent with the charter or with the Constitution or laws of the United States or of this State, for the purposes enumerated, and to inflict as a penalty for a violation thereof, a fine not exceeding fifty dollars. After the special designations, is the general clause, "And said city council may make and establish, and the same alter, amend or repeal, any other by-laws, rules and ordinances which they deem necessary for the well being of said city and not repugnant to the Constitution or laws of this State."

Power to make the ordinance in question was not expressly given to the council, and they had no power to make it, beyond what is given under the general clause above quoted.

The people of the State have a right to bear arms for the defense of themselves and the State. Const. c. 1, Art. 16. But by V. S. 4922, a person is prohibited from carrying a dan-

gerous or deadly weapon, openly or concealed, with the intent or avowed purpose of injuring a fellow man; and by section 4923, no person can carry or have in his possession any fire-arm, dirk knife, bowie knife, dagger or other dangerous or deadly weapon, while a member of, and in attendance upon, a school. Section 4924 provides a penalty for intentionally, without malice, pointing a fire-arm toward another person, and for discharging such fire-arm so pointed, without injury to another person; and by section 4925 a punishment is inflicted where another person is maimed or injured by the discharge of such fire-arm. But section 4926 provides that the two preceding sections shall not apply where fire-arms are used in self-defense, or in the discharge of official duty, or in case of justifiable homicide.

Under the general laws, therefore, a person not a member of a school, may carry a dangerous or deadly weapon, openly or concealed, unless he does it with the intent or avowed purpose of injuring another; and a person who is a member of a school, but not in attendance upon it, is at liberty, in a similar way, to carry such weapons.

In *State v. Carleton*, 48 Vt. 636, it was held that the owner of land, having the right to use reasonable force in expelling a trespasser therefrom, had the right to go prepared to defend himself against any assault that the trespasser might make upon him while in the exercise of that right; and that if he only intended to use a pistol in such an emergency in defending his own life, or against the infliction of great bodily harm, the carrying of the pistol for such purpose would be lawful.

By the ordinance in question, no person can carry such weapon concealed on his person within the city of Rutland in any circumstances, nor for any purpose, without the permission.

of the mayor or chief of police in writing. Therein neither the intent nor purpose of carrying them enters into the essential elements of the offense. Simply to carry them concealed without such permission constitutes a violation of the ordinance. But if a permission is procured from either of those officials, there is no violation of the ordinance, even though the carrying of the weapon be with the intent or avowed purpose of injuring another person; and that a person is a member of a school, and in attendance upon it, forms no exception. Consequently, unless a special permission is granted by the mayor or chief of police for that purpose, a person is prohibited from carrying such weapons in circumstances where the same is lawful by the Constitution and the general laws of the State; and there is nothing in the ordinance to prevent the granting of such permission, notwithstanding it be in circumstances to constitute a crime under the general laws. The result is that Ordinance No. 10, so far as it relates to the carrying of a pistol, is inconsistent with, and repugnant to, the Constitution and the laws of the State, and it is therefore, to that extent, void. Whether this renders the whole ordinance illegal, or whether it contains any other invalid provisions, are questions not now before the Court.

Judgment reversed, and sentence set aside, demurrer sustained, complaint adjudged insufficient and quashed, the respondent discharged and let go without day.

JOHN B. FLETCHER v. ANNA M. BRAINERD.

January Term, 1903.

Present: TYLER, START, WATSON, STAFFORD and HASKELTON, JJ.

Opinion filed June 4, 1903.

Equitable lien—Married woman—Liability prior to passage of V. S. 2644—Effect of payment.

One who, prior to the passage of V. S. 2644, loaned money to a married woman for the benefit of her real estate, which was used for that purpose, is entitled to an equitable lien on such real estate therefor. Payments made on such debt from the property of such married woman, with her knowledge and consent, or that of her agent in the transaction, are a recognition of the creditor's equitable rights, and will prevent the claim from becoming stale.

APPEAL IN CHANCERY. Heard on the report of a special master, at the September Term, 1902, Franklin County, *Munson*, Chancellor. Decree for the defendant. The orator appealed.

William P. Dillingham, Fuller C. Smith, and Alfred A. Hall for the orator.

The money went to benefit the sole and separate estate of the defendant, and in equity it must respond for the debt. *Sergeant v. French*, 54 Vt. 384; *Dale v. Robinson*, 51 Vt. 20.

It being found that Herbert Brainerd was the agent of the defendant, the objection that the endorsements upon the note were not made by the defendant and were without her knowledge, falls to the ground. *Lawrence v. Graves' Est.*, 60 Vt. 657.

The case does not present the elements of a stale demand. The endorsement of the dividends began before the statute had

run upon the note, and continued down to the commencement of this action. *Whipple v. Blackinton*, 97 Mass. 476; *Porter v. Blood*, 5 Pick. 54; *Haven v. Hathaway*, 20 Me. 345; *Buffington v. Chase*, 152 Mass. 534; Jones on Pledges, ss. 398, 400, 551.

The Court of Chancery will not, from lapse of time, raise the presumption of adjustment or payment, if the case furnishes evidence satisfactorily accounting for the delay. *Spear v. Newell*, 13 Vt. 288.

A demand on the note was essential to perfect the cause of action. *Wood on Lim.*, s. 119; *Stanton v. Stanton*, 37 Vt. 411; *Smith v. Franklin*, 61 Vt. 385; *Blaisdell v. School Dist.*, 72 Vt. 63; *Poultney v. Wells*, 1 Aik. 180; *Little v. Blunt*, 9 Pick. 488; *Girard Bank v. Bank of Penn.*, 39 Pa. 92; *United States v. Wardwell*, 172 U. S. 48; *Payne v. Gardner*, 29 N. Y. 146.

Where delay in making demand was contemplated by the express terms of the contract, the demand need not be made within the statutory period. *Dougherty v. Wheeler*, 125 Ind. 421; *Taylor's Admrs. v. Whitman's Admrs.*, 3 Grant's Cas. 138; *Norton v. Ellam*, 2 M. & W. 461.

C. W. Witters for the defendant.

The case shows repeated demands made by the holder of the note on Herbert Brainerd, the agent of the defendant. These demands resulted in the payments of August 15, 1883, November 26, 1883, and May 8, 1884. So the claim is a stale one.

The payments of the dividends were not voluntary, and will not avail the orator. *Rand on Com. Pap.* 1622; *Woodruff v. Cook*, 73 N. W. 706; *Moffitt v. Carr*, 28 Neb. 403;

Campbell v. Baldwin, 130 Mass. 199; *Harper v. Fairley*, 53 N. Y. 442; *Buffington v. Chase*, 152 Mass. 534.

If a demand was necessary on the note in question before a suit could be brought, it should have been made within six years. *Stanton v. Stanton's Est.*, 37 Vt. 411; *Thall v. Mead's Est.*, 40 Vt. 540; *Smith v. Franklin*, 61 Vt. 388.

The Court of Equity should treat this claim as stale, and refuse aid in its enforcement. Pom. Eq. Jur., s. 419; *Preston v. Preston*, 95 U. S. 200; *Codman v. Rogers*, 10 Pick. 111.

TYLER, J. This bill is brought to enforce an equitable lien upon the defendant's dwelling-house by reason of the orator having furnished her two thousand dollars with which to make repairs thereon. The defendant contends that the Statute of Limitations has run upon the claim, and that it is a stale demand.

The master finds that in the year 1880 the defendant, Anna M. Brainerd, and her husband, occupied a house and lot situated in St. Albans, owned by Mrs. Brainerd as her separate estate; that they desired to make extensive repairs upon the house, and found it necessary to borrow money for the purpose; that Mr. Brainerd applied to the orator for a loan of \$2,000, explained to him the purpose for which the money was required, that the house was Mrs. Brainerd's, and offered the orator her note for the amount, saying that he would sign it as surety, and also turn over to the orator National Car Co. stock as security. The negotiations resulted in the orator making a loan of \$2,000, and taking a note therefor, dated April, 1880, payable fourteen days after demand, with interest, signed by Anna M. Brainerd, and by her husband as surety. It bore the following indorsement: "I have deposited with J. B. Fletcher as collateral for the payment of this note

when due, twenty-seven shares of National Car Company stock, with full power to sell the same without notice, in case of non-payment of this note at its maturity.

(Signed) A. M. B."

No question was made at the trial but that this stock was Mrs. Brainerd's property.

It is found that in negotiating the loan Mr. Brainerd acted for himself and his wife, and that the orator so understood the transaction, but he had no conversation with Mrs. Brainerd upon the subject. As the homestead was in her name, and the stock was then valued at par, he considered that the loan was well secured.

The master, in effect, finds that the \$2,000 was used by the defendant in repairing her house; that the orator has held the note ever since it was given as his own property, and the Car Company stock as collateral security for its payment; that he never made any demand on the defendant personally for payment until March 12, 1900, when he made a formal demand in writing.

The following payments were made by Mr. Brainerd: \$200 Aug. 15, 1883; \$100 Nov. 26, 1883; \$138 May 8, 1884; and, beginning Jan. 1, 1885, the quarter yearly dividends upon the stock down to April 1, 1901, were paid to the orator by Mr. Stranahan, as treasurer of the Company, and by him indorsed upon the note at the orator's request.

In 1884 and 1885 the orator several times requested Mr. Brainerd to pay the note, which requests not being complied with, the orator told him that he must have the dividends on the stock, and they were paid to him, as above stated.

The master submits the question to the Court, whether, upon the evidence which he recites, Mr. Brainerd was the agent of his wife in the transactions about the loan. The evi-

dence clearly shows that fact; indeed, the defendant's brief and argument proceed upon the ground that Mrs. Brainerd, in allowing her husband to negotiate the loan, receive the money, deliver the note to the orator, and control the dividends on the stock—the certificates for which she had given him to deliver to the orator—held her husband out to the orator as her agent, and that the orator recognized him as such.

It is said in the defendant's brief that, during the entire twenty years, Mr. Fletcher acted upon the presumption that Herbert Brainerd was the defendant's agent; that whatever demand was made upon him for payment upon this note, which was given, as claimed, for money to use in the improvement of the defendant's property, was a demand upon the defendant; that when the orator notified Brainerd that he should thereafter take the dividends on the Car stock, it was notice to the defendant. This is in accordance with the master's findings, though not expressly so stated by him. The defendant cites the general rule that notice to an agent, while acting within the scope of his authority, and in reference to a matter over which his authority extends, is notice to the principal.

The defendant concedes that, upon the master's findings, a demand made upon Mr. Brainerd was a demand upon her; but she insists that the payment of the Car stock dividends was made by the treasurer of the Company to the orator, and not by the defendant nor by her agent. We think, however, that the master's report must be construed to mean that when Mr. Brainerd, as agent of his wife, ceased making payments upon the note, and the orator said, "I will have to require the dividend upon the stock," the agent assented to it. There is nothing in the report of the master, nor in the testimony that he submits, to indicate that the application of the dividends was not in accordance with both Mr. and Mrs. Brainerd's wishes.

It is found that Mr. Stranahan was the defendant's brother-in-law, her warm friend and adviser, and that in business matters he advised with her and her husband. He was treasurer of the company and the orator was its superintendent, and they occupied the same office-room. Mr. Stranahan knew that the orator had some money to invest, and suggested to him to make a loan to the Brainerds to enable them to make repairs upon their house; therefore Stranahan's handing the dividend checks to the orator was the natural sequence of the orator's requiring the payment of the dividends to himself. The master expressly finds that the payment of dividends to the orator was in consequence of his insisting that they should be so paid.

In this state of the case, the defendant contends that the indorsements were not voluntary, and that the Statute of Limitations had run upon the note before this bill was brought. It is the general rule that part payment is an implied acknowledgment of the existence of the claim upon which the payment is made, from which the law implies a promise to pay the balance. *Corliss v. Grow*, 58 Vt. 702, 2 Atl. 388. As the Court said in *Campbell v. Baldwin*, 130 Mass. 199: "The ground upon which a part-payment is held to take a case out of the statute is, that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect, it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment."

In accordance with this rule it is held that where the debtor's property is sold on legal process and the proceeds applied upon the debt, it is not a voluntary payment, and will not pre-

vent the running of the statute. Any enforced part payment will not stay the statute. *Benton v. Holland*, 58 Vt. 533, 3 Atl. 322, and cases cited in the opinion. For the same reason, it is said that the weight of authority favors the rule that the creditor's application of the proceeds of security foreclosed by him, in payment *pro tanto* of the note or debt, does not operate as a payment by the debtor at that time so as to start the statute anew, because there is no voluntary affirmative act by the debtor implying a promise to pay the balance of the debt. 19 Am. & Eng. Ency. 328.

But the debtor's request to have payments applied or indorsements made upon his note need not be proved. It may be proved that he assented to the act after it was done, and his assent may be implied from his conduct and the circumstances attending the transaction. The fact that these indorsements were made is some, but not sufficient, evidence of a voluntary application of the dividends in payment of the note, and it has more weight because the first indorsement was made before the statute had run. *Bailey v. Danforth*, 53 Vt. 504; *Lawrence v. Graves*, 60 Vt. 657, 15 Atl. 342. That these dividends were received by the orator and indorsed quarterly for fifteen years, pursuant to the notice given by the orator to the defendant's agent, and without objection, are facts from which it may be inferred that the payments were voluntary.

In this view it is immaterial that the twenty-seven shares of stock were not available until the maturity of the note, for the dividends thereon were voluntary payments made with the defendant's assent, and prevented the orator's demand from becoming stale.

If the orator's case depended upon a contract existing between the defendant and himself, evidenced by the note, his demand of payment in 1884 and 1885 would have put the statute

in motion, and it would have run upon the note in six years and fourteen days after such demand, except for the application of the stock dividends. But the case does not rest in contract. The defendant was under the disability of coverture when she signed the note, and could not, under the law as it then existed, create a lien upon her separate property. This the orator concedes, but bases his claim upon the fact that the loan was made and used to benefit the defendant's property, and contends that in equity the property is chargeable with the amount of the loan.

The rule generally adopted in this country is stated in *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, and quoted with approval in the opinion in *Dale v. Robinson*, 51 Vt. 20, 31 Am. Rep. 669, that, "equity recognizes a married woman's debt, and charges it upon her separate estate, not on the ground that the contracting of it is of itself an appointment or charge, but because, when contracted on the credit of the separate estate, or for its benefit, or that of the woman, it is just that the estate should answer; * * * ." The same rule is declared in *Willard v. Eastman*, 15 Gray, 328, 79 Am. Dec. 366, and cited in *Dale v. Robinson*.

The question is not whether the application of the dividends upon the note saved it from the statute, so that an action at law could be maintained upon it, but whether these payments, made, as it must be assumed, with the knowledge and consent of Mr. Brainerd, who acted for his wife in all these transactions, were in recognition of the orator's equitable right, so as to bring the case within the rule in *Dale v. Robinson*, *supra*, and *Sargent v. French*, 54 Vt. 384. We think the case shows that the orator forbore the enforcement of his claim during all the time the dividends were received by him, and that the defendant, through her agent, assented to the ap-

plication of the dividends upon the note in recognition of such claim.

In this view, the Statute of Limitations does not apply to the case. We hold that, upon the facts found, the demand is not stale, and that the orator is entitled to have the amount due upon his note paid from the estate which was benefited by the money for which the note was given, and that he have an equitable lien upon said estate therefor.

Decree reversed and cause remanded to the Court of Chancery, with mandate to that Court to enter a decree for the orator according to the prayer of the bill.

STATE v. J. P. DONOVAN.

January Term, 1903.

Present: TYLER, MUNSON, START, STAFFORD and HASELTON, JJ.

Opinion filed June 4, 1903.

*Forgery—Indictment—Variance—Amendment—Evidence
—Exhibiting note to jury—Discretion of trial Court.*

Material and immaterial variances between the proof and an indictment for forgery, considered.

It is within the discretion of the trial Court, even after the evidence is closed, to permit the State's Attorney to amend an indictment for forgery so as to set out the instrument correctly, and to refuse a postponement of the trial is not error.

A memorandum on the back or margin of a note, made at the time of its execution, forms a part of it, and is the subject of forgery.

On the question whether a note, payable in 4½ inch clapboards, had been so changed as to require payment in 5½ inch boards, evidence

that a note, subsequently given to settle a controversy over the quantity delivered, was payable in boards of the latter width, was inadmissible, in the absence of evidence that the payee especially wished boards of that width.

It was not error for the Court to refuse to order the State's Attorney to deliver certain letters to respondent's counsel during his cross-examination of the State's witness, since the letters were afterwards produced and the respondent had full benefit of them.

The time when written evidence may be exhibited to the jury is within the discretion of the Court.

It is not error to exclude a question asked by the respondent of his witness, which does not meet any testimony given by the State,—especially when such witness' subsequent testimony fairly covers the point of the inquiry.

Nor is a cross-examination improperly restricted, when the witness' testimony fairly covers the subject matter of the proposed question.

On the question whether a note, payable in lumber of a certain width, had been so changed as to require payment in lumber of another width, the value of the lumber actually delivered under the contract is material.

On this question, evidence as to the usual price of the article for which such note was given, is admissible.

INDICTMENT FOR FORGERY. Trial by jury on a plea of not guilty, at the March Term, 1901, Washington County, *Watson, J.*, presiding, after respondent's demurrer to the indictment had been overruled, and his exception thereto had been ordered to lie without prejudice. Verdict, guilty. Judgment thereon, and sentence deferred. The respondent excepted.

John W. Gordon and *Truman R. Gordon* for the respondent.

The respondent excepted to the admission of the note in question, and pointed out various variances between it and the instrument set forth in the indictment. When an indictment professes to set out a written instrument by its tenor, the proof

must conform thereto with almost the minutest precision. 1 Bish. Crim. Pro. ss. 488, 561, 562; *Griffin v. State*, 14 Ohio, 55; 1 Chit. Crim. L., 235; *Reg. v. Drake*, Holt, 95, and many other cases.

The memorandum on the margin of the note is not the subject of forgery. *Henry v. Cole*, 5 Vt. 402; *Fletcher v. Blodgett*, 16 Vt. 26; *Roberts v. Smith*, 58 Vt. 492; *Benedict v. Cowden*, 49 N. Y. 396.

The Court could not allow an amendment of the indictment in the essential particulars complained of. *State v. Briggs*, 34 Vt. 501; *Commonwealth v. Bigelow*, 8 Met. 835; *Hughes' Crim. L. & Pro.*, 964; 3 Greenl. Ev., 107; *Gilchrist's Case*, 2 Leach, 660.

The refusal of the Court to order the State's Attorney to produce the letters written by the respondent was prejudicial.

The respondent should have been allowed to show the value of the clapboards actually delivered. That the witness furnished clapboards whose value would not make the price of the organ as specified in the agreement, was a material fact.

The Court should have permitted the respondent to exhibit the note to the jury in connection with the testimony of Will Parsons.

A verdict of acquittal should have been ordered. There was no proof that the respondent made the change alleged, except the fact that he had the note in his possession. This was not sufficient to warrant a conviction. Underhill on Cr. Ev., s. 426; *Miller v. State*, 51 Ind. 405; *Fox v. People*, 95 Ill. 71; *Reg. v. Geach*, 9 C. & P. 499; *Rex v. Shukard*, R. & R. 200.

The respondent should have been allowed to ask Will Parsons if he saw Donovan hand the note to Mr. Parsons. It was to meet the testimony of witnesses of the State, and it was error to exclude it. *Norton v. Parsons*, 67 Vt. 526.

The fact that the thirty dollar note was payable in 5½ inch boards was material. It bore upon the probability as to what the original contract was in this particular.

The usual price of the organ was material. The State was allowed to show the value of 5½ inch clapboards, and the evidence offered as the value of the organ should have been received.

The Court should have charged that the presumption of innocence may, in itself, create a reasonable doubt of guilt. *Coffin v. United States*, 156 U. S. 432; *Cochran v. United States*, 157 U. S. 286.

Richard A. Hoar, State's Attorney, for the State.

The note and the writing on the back of the same is within the statute. *State v. Shelters*, 51 Vt. 102; *State v. Briggs*, 34 Vt. 501; *State v. Nevins*, 23 Vt. 592.

The variances were immaterial. *People v. Warner*, 5 Wend. 271; *Marion v. Foxon*, 20 Conn. 486; *Morton v. Tenny*, 16 Ill. 494; *Banks v. Goss*, 31 Vt. 315; *Harris v. People*, 64 N. Y. 148; *State v. Arnold*, 50 Vt. 731.

The amendments were properly allowed. *State v. Casavant*, 64 Vt. 405; *Atkins' Est. v. Atkins' Est.*, 69 Vt. 270; *Swerdferger v. Hopkins*, 67 Vt. 136.

It was not error for the Court to refuse to produce the letters, referred to by the witness without inquiry by the State's Attorney. *Cutler & Martin v. Skeels*, 59 Vt. 154.

It was not error to exclude the testimony relative to the value of the boards delivered. The only question was as to the market value of boards of different widths.

It was proper to exclude the terms of payment of the thirty dollar note. This note was given nearly two years after the original was given, and had no bearing on the ques-

tion at issue. For the same reason, the evidence as to the usual price of the organ was properly excluded.

TYLER, J. This is a prosecution for forgery. The indictment charges that the respondent had in his possession October 22, 1897, a certain promissory note, for the sum of one hundred dollars, payable to himself or bearer, on demand, with interest, "which note then and there was of the tenor following:

'No salesman is authorized to make any promise or agreement at variance with terms of the following note and agreement.

J. P. Donovan,
dealer in Pianos,
Organs, Sewing
Machines, Etc.,
Montpelier, Vt. } \$100.00

Montpelier, Vt., Oct. 22, 1897.

On demand, I promise to pay J. P. Donovan, or bearer, one hundred dollars at the First National Bank, Montpelier, Vt., with interest, value received for one Packard organ, style chapel, 441, No. 55257, to remain the property of J. P. Donovan, or bearer, until the note is paid in full.

Conditions are to pay \$. on the day of, and \$. on the day of each month thereafter until the note is paid in full.

Alonzo A. Parsons.

Witness.

No specified time for goods to be delivered.

Union Card Co., Printers, Montpelier, Vt." ..

And on the back of said note there was then and there written the following words and figures:

'N 2-134 *Alonzo A. Parsons, Warren, Vt.* 1279-N.

I will deliver to Montpelier, Vt., 20 thousand ft. of 4½ in. cottage clap-boards, in payment of this note by Dec. 30, 1897.

(Signed) Alonzo A. Parsons.

Accepted the above offer, J. P. Donovan.'

The indictment further charges that afterwards, on the same day, the respondent, " * * * , with force and arms, wittingly,* * * , and feloniously, did alter the said promissory note, and the writing on the back of said promissory note as aforesaid, by then and there wittingly, * * * , and feloniously making, forging, and changing the figures 4½ then and there written on the back of said promissory note by the said J. P. Donovan to the figures five and one-half, and the said figures four and one-half so being on the back of said promissory note were so changed and written, and were falsely made, forged and added as aforesaid, did become, import and signify five and one-half, which altered promissory note, and the said writing on the back of said note, which was then and there a material part of said note, is now in the words and figures as altered as aforesaid, are, 'I will deliver to Montpelier, Vt., 20 thousand ft. of 5½ in. cottage clapboards in payment of this note by Dec. 30, 1897, Alonzo A. Parsons.' Accepted the above order, J. P. Donovan. With the intent," Etc.

To the indictment the respondent filed a general demurrer and assigned several causes. The demurrer was overruled by the trial Court, and the respondent excepted. The questions raised on the demurrer, on exceptions to the rulings during the trial, and to the charge of the Court, are presented in the respondent's brief.

It appeared that the respondent sold to Alonzo A. Parsons a Packard organ, and received from him a certain writing. The State claimed that the respondent changed the figure "4" to the figure "5," after he received the paper, so as to require payment in 5½ inch, instead of 4½ inch, boards; the former being of more value than the latter. The alleged change of "4" to "5" was the forgery charged.

When the paper was offered in evidence, the respondent objected to it on the ground that there were several variances between it and the paper set out in the indictment. The principal variances alleged are:

1. The two lines at the head of the paper contain the words "promises" and "agreements," whereas, the indictment, before its amendment, used those words in the singular number.
2. The words on the right hand side of the paper: "A contract once completed cannot be amended," are omitted in the indictment.
3. The indictment omits the word "to" before "Donovan" in the clause, "On demand I promise to pay J. P. Donovan," etc.
4. The writing contains upon its face the words "Until 'this' note is paid in full." The indictment uses the word "the" instead of "this."
5. The respondent claims that the characters and figures on the back of the paper are "N. L. 134," whereas the indictment recites them as "N. 2-134."
6. In the indictment the word "signed," before the signature of Alonzo A. Parsons, is set forth, while the original paper shows that the word had been crossed off and was not a part of the paper.
7. On the back of the paper, after the "5 1-2" are the letters "inh," which the indictment sets out as "in."
8. The indictment charges that the respondent changed the figures "4 1-2" to "five and one-half," thus describing the change in words instead of figures.
9. In the acceptance on the back of the paper, the word is "offer," which the indictment recites as "order."
10. The agreement on the back of the paper is dated

"Dec. 30, '97," which is recited in the indictment as "Dec. 30, 1897."

The trial Court held all the variances immaterial, overruled the objections to the paper, and admitted it in evidence, to which the respondent excepted.

The respondent relies upon the rule laid down in 1 Bish. Cr. Pro. § 488: "If the indictment professes to set out a writing by its tenor, whether in the particular case this exactness of averment is necessary or not, the proof must conform thereto with almost the minutest precision."

Some of these variances are immaterial under the strict rule above cited; for instance, the lines at the head of the writing contain an instruction to the respondent's salesman, and the words "any promise or agreement," necessarily mean the same as "any promises or agreements." These lines and the words, "A contract once completed cannot be amended," are only important as descriptive of and identifying the paper. The omission in the indictment of the word "to" before the respondent's name, the use of "2" for "L," and "in" for "inh" on the back of the paper, are immaterial. Under the rule in Bishop, the use of the words "five and one-half" and "four and one-half," was a material variance, for there was in fact no change of words; the change, if made, being of the figure "4" to the figure "5." The same is true in the substitution of "order" for "offer," for there was no "order" of Parsons to accept boards for the one hundred dollars.

But it is unnecessary to discuss these variances *seriatim*, for, by virtue of V. S. 1912, it was within the discretion of the trial Court to permit the State's Attorney to amend the indictment and set out the instrument accurately, although this was done after the testimony was closed. It is inconceivable that the respondent could have been prejudiced thereby in his de-

fense upon the merits. It did not vary the proof necessary to be made either by the State or the respondent. It was within the exercise of a reasonable discretion by that Court, in view of the character of the amendments, to refuse a postponement of the trial. V. S. 1912.

But the respondent contends that the indictment as amended did not describe an instrument that is the subject of forgery, under V. S. 4977, and excepted to the admission in evidence of the paper described.

The instrument was upon its face a promissory note for one hundred dollars, given by Parsons to the respondent for an organ, and payable on demand. The writing on the back was made at the same time, was a part of the note, and is to be treated as if it had been inserted in the body of the note for the purpose of fixing the time and manner of payment of the one hundred dollars. It was long since decided in this State that a memorandum upon the back or margin of a note, made at the time of its execution, forms a part of it, although it contains an important qualification of the contract. *Henry v. Colman*, 5 Vt. 402; *Fletcher v. Blodget*, 16 Vt. 26, 42 Am. Dec. 487; *Denison v. Tyson*, 17 Vt. 549; *Reed v. Sturtevant*, 40 Vt. 521.

Roberts v. Smith, 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567, is not in point, for there the promise was to pay J. S. King, or bearer, one ounce of gold, which was held to be a simple contract. It was not in form a promissory note, and, as the Court said, it was not even a promise to pay a given sum in specific articles. Where the contract is to deliver specific articles, it is not a promissory note; but, where the contract is to pay a specified sum in specific articles, it is a promissory note. Rob. Dig. 92, pl. 13, 14, 15.

The respondent claimed a shortage in the amount of lumber received, and wrote Parsons two letters upon the subject; one, making a claim of shortage, and the other demanding damages therefor. A suit followed, which was settled by Parsons giving the respondent a note for thirty dollars. The respondent offered to show that this note was payable in 5½ inch clapboards, as tending to show that the original note was payable in that width, which offer was properly excluded as immaterial. In the absence of evidence that Donovan especially wished for that width, the evidence had no tendency to establish the fact claimed.

There was no error in the Court's refusal to order the State's Attorney to deliver these letters to the respondent's counsel during his cross-examination of Parsons. Without now considering what the general right of a respondent may be as to having papers delivered to him for the purpose of cross-examination, in this case the letters were afterwards produced by the State, and the respondent had the full benefit of them, though they do not seem to have had any weight as evidence.

The respondent had ample opportunity to show the note to the jury while the evidence was being introduced and during the arguments, and he was not harmed by the Court's refusal to allow him to exhibit it to them during the examination of a particular witness. When it should be shown to the jury was a matter in the discretion of the Court.

The direct question put by the respondent to his witness Dearborn: "Did you see Mr. Donovan hand this 'Exhibit A' to Mr. Parsons while you were there?" was properly excluded. It was not asked to meet any testimony given by Parsons. The State's evidence tended to show that Dearborn was where he could not have seen the transaction inquired about. Besides,

after this exception was taken, Dearborn testified fully and without objection in whose hands he saw the paper,—that it was in no one's hands but Donovan's, and Alonzo Parsons', while he was signing it. Dearborn also testified that he did not see Donovan do anything with the note but hold it in his hand.

The respondent was not restricted in his cross-examination of Parsons upon the question whether the latter did not guarantee that the lumber to be delivered was worth five dollars a thousand, for he had repeatedly answered that there was *no* conversation about the price.

The trial Court gave the respondent full opportunity to make proof relative to the respective values of the two widths of boards, and no restriction was placed upon his cross-examination of Parsons upon this point. The witness had repeatedly answered that there was no conversation about the prices of the two grades; that their conversation related solely to the number of thousand feet of $4\frac{1}{2}$ inch lumber that the witness would give and the respondent receive for the organ.

Parsons was an important witness for the State; he had testified about the transaction between himself and the respondent, and that the $4\frac{1}{2}$ inch boards were the only ones mentioned. The respondent testified that $5\frac{1}{2}$ inch boards were agreed upon. The Court correctly said that the real question was which width was offered and accepted, and, bearing upon the probability of one or the other party being in the right, held it competent to show the respective prices or values. Parsons testified upon this subject, and we think it was proper cross-examination to show by him that the lumber that he delivered to the respondent under the agreement was only of the value of three dollars per thousand at the place of delivery. In the exclusion of this line of inquiry there was error, for it grew out of Par-

sons' direct testimony, and it bore directly upon the probability of the respondent having agreed to accept lumber of this value. There being no evidence tending to show a different value, it was reasonable to presume that the lumber shipped by Parsons was of the average quality and value of that width of boards. The exclusion of the offer of evidence in defense to show that the boards delivered at Montpelier were worth only three dollars per thousand feet was error. The value of the boards delivered tended to establish the value of all boards of that width that the parties considered. Parsons had testified that the value of the wider boards was one dollar and a half to two dollars per thousand more than the others.

The respondent testified that several grades of boards were discussed during the negotiations; that he was indifferent as to which grade he should receive, but that he demanded twenty-five thousand feet of the $4\frac{1}{2}$ inch, while Parsons would offer only twenty thousand feet. Parsons testified that no grade was mentioned, other than the $4\frac{1}{2}$ inch and that prices and values were not spoken of. So it was a vital question which width was agreed upon. If $5\frac{1}{2}$ inch, those figures should appear in the offer.

For the same reason that it was competent, as the Court held, to show the values of the two kinds of boards, it was competent to show the usual price of this kind of organ, although the price was agreed upon. If the usual price had been considerably more than one hundred dollars, it was less likely that Donovan would have sold this one for a quantity of lumber worth only from sixty to eighty dollars, than that he would have sold it for the same quantity, the market value of which was one hundred dollars.

The rule respecting the admissibility of evidence in such cases is well stated in *Kimball v. Locke*, 31 Vt. at p. 686, * * *

"On the question whether a person did a particular thing or not, the character of the subject matter, and the circumstances affecting the relation of the parties to that subject matter, affect the probability of the thing in question having been done as claimed." It was error to exclude the evidence tending to show that the usual price of that kind of organ was from \$110 to \$115. It was just as competent to show the usual price of the organ, as bearing upon the probability of a certain act having been done, as it was to show the prices of the two grades of lumber, as bearing upon that probability.

No other exceptions to the rulings are sustained. There was no error in the charge.

Judgment reversed, verdict set aside, and new trial granted.

ISAAC S. WILSON v. UNION MUTUAL FIRE INS. CO.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON and HASELTON, JJ.

Opinion filed June 4, 1903.

Fire insurance policy—Construction—Condition—Steam farm engine—Use—Pleading.

When a fire insurance policy prohibits the use of a "steam farm engine" within a certain distance of the buildings insured,—there being no such type or style of engine,—the use, within the prohibited distance, of any steam engine adapted to all farm purposes for which an engine can be used, vitiates the policy.

The fact that the policy covered other engines, located on the premises as described therein, did not justify the use of the engine here complained of.

The engine was being "used" within the meaning of the policy, since its use was as permanent as the character of the work required. This defense can be made under a notice, without a special plea.

GENERAL ASSUMPSIT on a fire insurance policy. Plea, the general issue with notice of special matter. Trial by jury at the September Term, 1902, Orleans County, *Haselton, J.*, presiding. Defendant's motion for a verdict overruled. Verdict and judgment for the plaintiff. The defendant excepted.

Young & Young for the defendant.

The use of the engine within sixty-eight feet of the buildings insured vitiates the policy, and a verdict for the defendant should have been ordered.

It increased the risk, and the provision of the policy was a reasonable one. *Finley v. Insurance Co.*, 74 Vt. 211; *Esterbrooks v. Company*, 52 Atl. 1048; *Church v. Insurance Co.*, 158 Mass. 475; *Davis v. Insurance Co.*, 81 Ia. 496; *Lyman v. Insurance Co.*, 98 Mass. 329; *Marion v. Insurance Co.*, 21 Pick. 162; *Dittmer v. Insurance Co.*, 8 Am. Rep. 600.

This engine was a "steam farm engine," because it was adapted to all purposes for which an engine can be used on a farm. The meaning of this term as used in the policy was a question for the Court. *Eaton v. Smith*, 20 Pick. 150; *State v. Stevens*, 69 Vt. 411; *Mixer v. Reed*, 25 Vt. 254; *Magoon v. Harris*, 46 Vt. 264; *Wood v. Railroad Co.*, 24 Vt. 608; *Wead v. Marsh*, 14 Vt. 80; *State v. Abbott*, 20 Vt. 537.

J. W. Redmond for the plaintiff.

It was not error to submit to the jury the question whether the engine was a "steam farm engine." *Brown & Co. v. McGran*, 14 Pet. 479; *Lucas v. Groning*, 7 Taunt. 164; *Darling v.*

Dodge, 36 Me. 370; *Enos v. Insurance Co.*, 67 Cal. 621; *Insurance Co. v. Favorite*, 46 Ill. 263; *Carrigan v. Insurance Co.*, 53 Vt. 418; *Mosley v. Insurance Co.*, 55 Vt. 142.

Under the act of 1896, this defense must be raised by a special plea.

The engine was not being "used" within the meaning of the policy. The policy is to be construed against the Company. *Brink v. Insurance Co.*, 49 Vt. 457; *Mosley v. Insurance Co.*, 55 Vt. 142.

Use means *habitual use*. *Dobson v. Sotheby*, 22 E. C. L. 481; *Smith v. Insurance Co.*, 30 L. R. A. 368; *Mears v. Insurance Co.*, 37 Am. Rep. 647; *Insurance Co. v. Mayer*, 97 Pa. St. 441; *Bentley v. Insurance Co.*, 43 Atl. 209; *Adair v. Insurance Co.*, 45 L. R. A. 204; *Brink v. Insurance Co.*, *supra*.

The use of this engine was warranted since the policy expressly contemplated the use of engines on the premises. *Mascott v. Insurance Co.*, 69 Vt. 116.

TYLER, J. This action is brought upon an insurance policy to recover for the loss of the plaintiff's farm buildings and the personal property therein, that were insured by defendant company, which property was afterwards destroyed by fire. Plea, the general issue and notice of special matters in defense. The notice alleges that the policy contained the condition, among others, that using "a steam farm engine" within one hundred feet of any building insured should render the policy void, unless the consent of the company, in writing, duly certified by the Secretary, was given; that prior to the fire the plaintiff placed within one hundred feet of the buildings insured a steam farm engine with boiler and fire box attached, and built fires in the fire box, and operated the engine within that distance of the buildings insured, and continued to operate and use it there until the time of the fire, without the defendant's

consent, and in violation of the contract, and that the policy was thereby rendered void.

On the trial in the Court below the parties agreed that the question whether the fire was communicated from the engine to the buildings destroyed need not be submitted to the jury, and the Court instructed the jury that under the by-laws of the Company it was immaterial whether the fire was so communicated or not.

The plaintiff concedes in his brief that he placed and used the engine in question within the prohibited distance, but contends that it was not a steam farm engine as described in the policy.

Both parties admitted in argument that there was no class or kind of engines known as "steam farm engines," and that the by-law referred to prohibited the use of no other steam engines within the distance prescribed.

The defendant introduced no evidence tending to show what a steam farm engine was, but claimed that any engine that was adapted to general use for farm purposes answered the description in the policy.

The undisputed evidence was that this was an upright, portable engine; that it was originally purchased to draw logs from the river and for use about a mill, but for several years had been used alternately in drawing logs and to furnish power for cutting ensilage and filling silos, and had been used upon several farms for the latter purpose. An engineer called by the defendant as a witness testified that he had run the engine, and that it was adapted to all farm purposes where only a small amount of power was required, such as running a threshing machine, a circular saw for sawing wood, and a separator in a creamery. The plaintiff did not controvert this testimony further than to claim that the engine was not well adapted to

threshing grain, because it could not be set near enough to a barn to be used with safety. For anything that appeared in the evidence, this was true of any fire engine. Any engine would need to be placed a safe distance from the barn, and sufficient belting used to operate the machine. This engine was stationed about seventy feet from the barn when it was operating the ensilage cutter at the time of the fire. The plaintiff testified that he did not consider this a steam farm engine; that he had one that was insured in this policy that he called such an engine; but he did not point out any superior qualities that his engine possessed over the one in question. We infer that some other engine was better adapted to use in the creamery than was this, but the fact that another engine was more suitable than this for some purposes is not determinative that this was not a steam farm engine; nor, on the other hand, would the fact that this engine *could* be used for all farm purposes, but was unsuitable and could be used only at disadvantage, bring it within the terms of the policy.

But this is the true view: Both parties to the contract of insurance must have had in mind some kind of a steam engine, the use of which within one hundred feet of the buildings was prohibited, because such use exposed the buildings to fire. The exposure to fire was the obvious reason of the prohibition. It is conceded that there was no such class or kind of engines as the one named in the policy. There was no evidence tending to show that there was any engine better adapted than this to general use upon a farm. It appeared that it was a "general purpose" engine for a farm, as one witness described it without contradiction. There was no claim made that it did not furnish sufficient power for all purposes, so the most that could be said upon the evidence in support of the plaintiff's contention was that another kind of engine was more convenient than

this for certain uses. So we think that the one in controversy may reasonably be considered as within the contemplation of the parties when the contract was made, and within the meaning of the term employed.

Upon the undisputed facts, it was error in the trial Court to submit the case to the jury. This holding is not at variance with any case decided by this Court. In *Carrigan v. Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687, upon which the plaintiff relies, it was held that the question whether benzine was a drug should have been submitted to the jury, the Court saying that according to Webster's Dictionary a drug included any mineral substance used in chemical operations; that the trial Court could not say as matter of law that benzine was not included in that term, and that the question should have gone to the jury. In *Mosley v. Ins. Co.*, 55 Vt. 142, it was properly held that the question whether gin and turpentine fell within the denomination of inflammable liquids, as used in an insurance policy, was for the jury to determine, and that the Court could not take judicial notice of the fact that they were inflammable. In the present case the trial Court was not required to take judicial notice of any fact in relation to the engine. It appeared that it was a *portable steam engine* of four and a half horse power, and the undisputed evidence showed it to be adapted to all purposes for which a steam engine could be employed upon a farm. If there had been evidence tending to show that another kind of engine was better adapted to general farm purposes than this one, nevertheless, this was a steam farm engine; but there was no such evidence.

As the term "steam farm engine," is not the name of any pattern or style of engine, the words must be understood in their ordinary sense as descriptive of any engine adapted to farm purposes. Courts will take notice of the meaning of

English words and terms of art according to their ordinary acceptation. 1 Chit. Pl. 223. And words are to be given their common and ordinary meaning, unless it appears from the context that their meaning should be limited or enlarged. It was held in *Weed v. Marsh*, 14 Vt. 80, that the trial Court correctly held that the term "fulled cloth" was understood in common parlance to mean "woolen fulled cloth." In *State v. Abbott*, 20 Vt. 537, an indictment alleging the wounding and maiming of a "red three year old steer," was held sufficient under a statute against maiming or wounding cattle. Several cases are cited by the defendant where holdings of trial Courts that certain articles were or were not "tools," had been sustained under statutes exempting certain personal property from attachment,—among them is *Allen v. Thompson*, 45 Vt. 472, where the holding was sustained that a barber's chair and foot rest were "tools" within the meaning of the statute. *State v. Bowman*, 6 Vt. 594, was an indictment for having a crucible in the respondent's possession for the purpose of counterfeiting. The question upon the demurrer was whether the crucible described in the indictment was included in the statute which makes it a penal offense for a person to have in his possession any die, stamp, or other instrument or tool for the purpose of forging or counterfeiting. There is no intimation by Court or counsel that the question was not one for the Court rather than the jury, to decide.

A printed schedule is attached to the policy which includes most of the property insured, but several items are in writing, and among them is, "\$50 on engines, shafting, and belting."

It appears by the diagram that the boiler-house in which the boiler that propelled these two engines was placed, was within 100 feet of the buildings insured, and the plaintiff contends that the defendant must have contemplated in the con-

tract of insurance that these engines would be used for ordinary farm purposes, and that the written part of the contract must be construed to control the printed prohibition, within the rule in *Mascott v. Ins. Co.*, 69 Vt. 116, 37 Atl. 255. There the insurance covered a building "occupied for a storehouse and paint shop,"—a clause in the policy declaring that it should be void if benzine was "kept, used, or allowed upon the premises." The fire was caused by the use of benzine mixed with asphaltum in the paint shop, and it appeared that benzine was an article necessarily used in a paint shop; *held*, that it must be presumed that, when the defendant made the contract of insurance upon the building and authorized its use as a paint shop, it was acquainted with the business usually carried on there and the materials used, and that the written portion of the policy in this respect was intended to control the printed portion.

If the question in the present case were in respect to the use of the engines insured, the contract would be construed to mean that their use was contemplated by the defendant, in view of their situation and the safeguards around them and the boiler for protection against fire from their use. But the engine in controversy was not insured, was not upon the premises when the contract was made, and when used it had not the protection of a boiler-house, but was placed, with its boiler attached, upon trucks in the open field; therefore *Mascott v. Ins. Co.* does not control the present case. The written words in the policy insuring "engines, shafting, and belting," related to the engines then upon the premises, and presumably guarded in a manner that the defendant's agents could see and understand and that was satisfactory to them when they made the contract.

The plaintiff contends that he was not "using" the engine within the meaning of the term as employed in the by-laws; that the word means habitual use. Several cases are cited in which questions are discussed and decided, whether certain alterations in or uses of buildings insured invalidated the contract, and whether the keeping of certain commodities in buildings insured rendered the policy void. But each case must be determined upon its own peculiar facts, and assuming, though not deciding, that the general rule is as the plaintiff claims, the facts in this case do not support his contention that the use was not permanent, for it appeared that he borrowed the engine eight to ten days before the fire; that he used it two and a half to three days in filling his silo, and then moved it to another farm of his, and used it there about the same length of time for the same purpose; that it was idle four or five days when he moved it back to substantially the same place where it first stood, to complete the filling of the first silo, which would require two and a half or three hours' time.

Applying a liberal rule of construction to the word "using," as employed in the restrictive clause, we think the use of the engine was in violation of the contract. Its use was as permanent as the work of filling the silo required, and the use evidently was dangerous.

The defense was properly made under the general issue and notice, without a special plea alleging a violation of the contract. V. S. 1149. *Holdridge v. Holdridge's Estate*, 53 Vt. 546; *Worthen v. Dickey*, 54 Vt. 277.

Judgment reversed and cause remanded.

IN RE ANDREW ROGERS.

May Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed June 4, 1903.

Intoxication—Alternative sentence—Costs—Defective mittimus.

The alternative sentence for the non-payment of a fine imposed upon a conviction for a second offense of intoxication is imprisonment in the House of Correction.

A person convicted of a second offense of intoxication may be sentenced to pay costs.

A person will not be released because of a defective mittimus, but will be remanded that a new one may issue.

PETITION for writ of *Habeas Corpus*. The petition was made returnable before *Stafford, J.*, and by agreement of counsel was adjourned into the May Term, 1903, of Supreme Court.

Heaton & Thomas for the relator.

The mittimus does not properly describe the crime. V. S. 5417, F. 54; *In re McLaughlin*, 58 Vt. 136; *State v. Austin*, 62 Vt. 291.

It was not lawful for the Court to impose a fine with costs. No. 90, Acts of 1902, s. 97. V. S. 1864 does not apply.

The alternative sentence for a second offense of intoxication is imprisonment in the county jail for thirty days. Acts of 1902, *supra*; 21 Ency. Law, 936.

Frank A. Bailey, State's Attorney, and *Burton Bailey* for the State.

The defect in the mittimus is not reviewable in these proceedings. 2 Spell. Ex. Rem., s. 1219; 151 U. S. 396.

Costs follow in criminal cases unless otherwise ordered by Court. V. S. 1864.

The alternative sentence is to the House of Correction. V. S. 5206.

TYLER, J. This is a petition for a writ of *habeas corpus*, alleging that the relator is unlawfully imprisoned and restrained of his liberty in the county jail in the city of Montpelier, by the city sheriff, by virtue of a certain mittimus that was issued by the City Court.

The relator bases his petition upon three grounds: 1st, that the alternative sentence should have been confinement in the county jail for thirty days, whereas the sentence was confinement in the House of Correction for as many days as thrice the number of dollars to be paid by the sentence; 2nd, that the sentence was unlawful in imposing the payment of costs in addition to the fine of fifteen dollars, as fixed by the statute; 3rd, that the mittimus was defective in not describing the crime for which the respondent was committed.

1. Section 97, No. 90, Acts of 1902, reads: "A person who is found intoxicated shall, upon conviction of a first offense, pay a fine of five dollars with costs of prosecution, with an alternative sentence of imprisonment in the county jail for not less than ten nor more than twenty days, and for each subsequent conviction, he shall be fined fifteen dollars or be imprisoned in the county jail thirty days, or both. * * *"

Section 5206, Vermont Statutes, requires that when a Court sentences a person, over sixteen years of age, if a man, or over fifteen, if a woman, to pay a fine, or a fine and costs, it shall further order that, if the sentence is not complied with within twenty-four hours, he shall be imprisoned in the House

of Correction for the term above stated. This section was not repealed by the Act of 1902, and being in force, the alternative sentence imposed in this case was correct.

2. There is no conceivable reason why the Legislature should have intended that every person convicted of a first offense under section 97 should pay a fine and costs, and that costs should in no case be imposed upon a conviction of a second offense; therefore, we must either read into the section the words "with costs of prosecution" after "fifteen dollars," or conclude that the Legislature intended to leave the imposition of costs to the trial Courts under V. S. 1864, which gives those Courts discretionary power, in all criminal cases tried by them, to impose fines either with or without costs. The latter must be adopted as the more reasonable view, and in accordance with it the sentence of the city Court was warranted.

3. We hold that the mittimus is defective in not describing a criminal offense. It merely recites that the respondent had been "duly convicted of the crime of a second offense of intoxication." It is an essential element of this offense that the person complained of was "found" intoxicated. A complaint that alleged that a person "became and was intoxicated" was held bad on demurrer. *State v. Austin*, 62 Vt. 291, 19 Atl. 117.

But the relator is not entitled to a release because the mittimus was defective. It is the right and duty of the city Court to issue a new mittimus to carry the alternative sentence into effect. The judgment and all the proceedings being regular, the ends of justice ought not to be defeated by reason of a defect in the mittimus. It was held in *Re William Thayer*, 69 Vt. 314, 37 Atl. 1042, that a good mittimus may be substituted at any time in place of a defective one, even after the issue of a writ of *habeas corpus*.

Judgment that the relator is not unlawfully restrained of his liberty, that he be remanded to the former custody so that a new mittimus may issue, and that the petition be dismissed.

STATE v. FRED CUNNINGHAM.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed June 9, 1903.

Complaint—Sufficiency—Residence—Unlicensed auctioneer.

A complaint for selling goods at auction without a license, which alleges that the respondent is "temporarily" of the town or city where the offense is alleged to have been committed, is fatally defective.

COMPLAINT under No. 95, Acts of 1900. The respondent's demurrer to the complaint was overruled in the City Court of the city of Barre, Fay, Judge, where trial by jury was then had. Verdict and judgment, guilty. The respondent excepted.

F. S. Williams for the respondent.

The complaint is bad in that it does not negative that the respondent was a resident of Washington County. The exception is in the enacting clause, and a part of the description of the offense. *State v. Sommers*, 3 Vt. 156; *State v. Northfield*, 13 Vt. 565; *State v. Munger*, 15 Vt. 290; *State v. Barker*, 18 Vt. 195; *State v. Palmer, Id.* 570; *State v. Stevenson*, 68 Vt. 529.

The statute is unconstitutional, in that it discriminates against citizens of this State and other States, in favor of citizens residing in certain localities. *Cooley on Tax*, 169; *State v. Pratt*, 59 Vt. 590; *State v. Harrington*, 68 Vt. 622; *State v. Hoyt*, 71 Vt. 59; *State v. Cadigan*, 73 Vt. 245; *License Tax Cases*, 5 Wall. 462; *Railroad Co. v. Ellis*, 165 U. S. 150; *Vick Wo v. Hopkins*, 118 U. S. 356; *St. Louis v. Spiegel*, 90 Mo. 587; *Marshallton v. Blum*, 58 Ia. 184.

Richard A. Hoar, State's Attorney, for the State.

The exception is not descriptive of the offense. *State v. Norton*, 65 Vt. 258.

It was within the power of the Legislature to tax transient auctioneers as a distinct class. *Bank v. Feno*, 8 Wall. 533; *Robey v. Wilmington*, 8 Ired. L. 250.

HASELTON, J. No. 95, Acts of 1900, provides for the licensing of auctioneers, and then proceeds as follows: "If a person, not so licensed, sells or offers for sale at auction in any town or city in the State, goods, chattels or other property, he shall be fined not more than one hundred dollars and not less than ten dollars; but this section shall not apply to sales at auction * * * made by any person in the county where he resides."

This was a complaint, under the statute referred to, setting up the respondent as temporarily of the city of Barre. In other respects the complaint charged in appropriate terms the commission by the respondent at said city of Barre of an offense under the statute. The respondent demurred. The demurrer was overruled, and the complaint adjudged sufficient. Exceptions were allowed and ordered to lie pending a trial on the merits of the case. On the trial, which was before

the City Court of Barre, the respondent was adjudged guilty and the minimum fine provided by statute was imposed. The question before this Court is as to the sufficiency of the complaint.

According to usual and approved forms of pleading the phrase in the complaint describing the respondent as "of the city of Barre" sets him up as a resident of said city, unless it is prevented from having this effect by the use of the word "temporarily"; and we do not think it is so prevented. One may have a place of abode, such a place of abode as constitutes his residence, and yet such abode and residence may be of a temporary character. In *Jamaica v. Townsend*, 19 Vt. 267, the question was as to the residence of a person during a period of twenty-nine days. In discussing the matter of one's residence in such a case, the Court say: "The question is, where does he, for the time, dwell? Is he now at home? Where does he reside for the time being?" The expressions "for the time" and "for the time being" are equivalent to the word "temporarily." Each constitutes a good definition of that word. Cases in accord with the *Jamaica* case are *Middlebury v. Waltham*, 6 Vt. 200, and *Jericho v. Burlington*, 66 Vt. 529, 29 Atl. 801. It is to be observed that "residence" and "domicile" are not, strictly speaking, synonymous; that one may be domiciled in one place and at the same time have a temporary residence in another. 2 Kent Com. 431, note.

The respondent being, under the allegations of the declaration, temporarily a resident of the city of Barre, he had, by the express terms of the statute, the right there to do the acts complained of.

The constitutionality of the statute under which the complaint was brought was discussed in argument, but the con-

clusion above reached makes it unnecessary that the constitutional question should be decided.

Judgment and sentence reversed, demurrer sustained, complaint adjudged insufficient and quashed, and respondent let go without day.

W. G. PAYNE v. WILLIAM SHEETS.

January Term, 1903.

Present: TYLER, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed June 27, 1903.

Trespass—Ownership of locus—Special rights—Penal action.

One who owns the exclusive right to hunt, trap and fish upon the lands of another, is the "owner" of the land within the meaning of V. S. 4626, and may maintain the action therein provided.

This statute is remedial, not penal.

TRESPASS under V. S. 4626. Heard on the defendant's demurrer to the second count of the declaration, at the September Term, 1902, Franklin County, *Munson*, J., presiding. Demurrer overruled and count adjudged sufficient. The defendant excepted.

D. G. Furman and *Willard Farrington* for the defendant.

The plaintiff is not the owner of the *locus*, and has only an easement in the land. 2 R. & L. Law Dic. 915; *Parmenter v. Caswell*, 53 Vt. 6. The statute is penal and should be strictly construed. *Burnett v. Ward*, 42 Vt. 80; 2 Aik. 41; *Adams v. Nichols*, 1 Aik. 314.

Henry A. Burt and Alfred A. Hall for the plaintiff.

The plaintiff was the "owner." *Ellis v. Welch*, 6 Mass. 246; *Parks v. Boston*, 15 Pick. 198; 1 Hill. Real Prop. 23; 3 Greenl. Ex. s. 54; 2 R. & L. Law Dic. 915; *Lozo v. Southerland*, 38 Mich. 171; *Camp v. Rodgers*, 44 Conn. 291; *School v. Improvement Co.*, 57 N. U. 113; *Radcliff v. Wood*, 25 Barb. 22.

The action, though statutory, is an action of trespass and simply adds to the actual damage the sum of ten dollars.

WATSON, J. This action is trespass *quare clausum fregit* brought against the defendant under V. S. 4626, for wilfully entering upon the land described, without permission of the owner or occupant, for the purpose of shooting thereon, and the case is here on demurrer to the second count in the amended declaration. The sole contention of the defendant is that said count has no such allegation of ownership of the *locus in quo* in the plaintiff as enables him to maintain this action.

The allegation in this behalf is, that before and at the time when, and so forth, the plaintiff "was, and now is, the owner and occupant of said land and premises for the purpose of shooting, trapping, and fishing, and that the same was then and there, and now are, enclosed," etc. This allegation, construed most strongly against the pleader, shows that the plaintiff then was and now is the owner of the right to shoot, trap, and fish on the lands described, but not that he is the owner of the absolute fee. Inferentially, the land itself, except such interest therein, if any, as may be within the plaintiff's said right, is owned by some one other than the plaintiff. And in the consideration of the case we shall treat it in this respect as counsel on both sides have treated it in their briefs, namely,

that such right in the plaintiff, whatever may be its nature in law, is absolute and exclusive.

The statute provides a forfeiture of ten dollars by a person who wilfully enters upon such lands without the permission of the owner or occupant, for the purpose of fishing, trapping, or shooting thereon, "to be recovered by the owner thereof in an action of trespass, in addition to the damages sustained thereby." It is urged by the defendant that the words "owner thereof" have reference to the person who owns the legal title to the land, the one who would be entitled to recover the damages sustained by such entry, to the property itself, and not to a person having an ownership for a particular purpose, such as the plaintiff has, which the defendant contends is but an easement or a specific right that he may exercise on the land.

Has the plaintiff an easement merely, or has he an interest partaking of the reality? The determination of this question is of much importance in the solution of the main question, and therefore it requires careful consideration. By the common law of England, animals *ferae naturae* are not the subject of absolute property while at liberty in their wild state, but the owner of land is considered as having a qualified or special right of property in such animals, which are fit for the food of man, so long as they remain on his territory, and when killed or captured by the owner of the land they become his absolute property. *Sutton v. Moody*, 1 Lord Raym. 250; 2 Stephen's Com. 4-9; *Ewart v. Graham*, 7 H. L. Cas. 331; *Blades v. Higgs*, 11 H. L. Cas. 621, 3 Eng. Rul. Cas. 76. The English authorities upon the question of such right of property do not seem to be exactly in harmony; but if we keep in mind the legal meaning of the word "property" when thus used, the want of harmony largely disappears. It should be borne in mind also that noxious animals may not be within this rule.

The case of *Blades v. Higgs* was carefully considered by the House of Lords and is much in point. Therein Lord Chancellor WESTBURY says that when it is said by the writers on the common law of England, that there is a qualified or special right of property in game, that is, in animals *ferae naturae*, which are fit for the food of man, whilst they continue in their wild state, he apprehends that the word "property" can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called in law a reduction of them into possession; and that this right is said in law to exist *ratione soli* or *ratione privilegii*. His Lordship continues: "Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *ferae naturae* as may from time to time be found on his land, and as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown, by virtue of its prerogative, one man had of killing and taking animals *ferae naturae* on the land of another, and in like manner the game, when killed or taken by virtue of the privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil." And Lord COKE says (4 Inst. 304) "that, seeing the wild beasts do belong to the purlieu man, *ratione soli*, so long as they remain in his grounds he may kill them; for the property, *ratione soli*, is in him." See, also, 4 Bac. Abr. (Bouvier's ed.) 435.

It is laid down in 2 Black. Com. 419, that if a man start game on the private grounds of another and kills it there, the property belongs to him in whose ground it was killed, because it was started there, and the property arises *ratione soli*. Bees

are considered as *ferae naturae*, and the same principles of law governing the right of property therein are applicable. Again, Blackstone says: "But it hath also been said, that with us the only ownership in bees is *ratione soli*; and the charter of the forest, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found." 2 Black. Com. 393.

So it was held in *Gillet v. Mason*, 7 Johns. 16, where the question of such right of property was presented between the finder and a tenant in common in the land. And in *Goff v. Kilts*, 15 Wend. 550, it is said that a swarm of bees unreclaimed from their natural liberty while in the tree, like birds or other game, belong to the owner of the soil *ratione soli*. And the same doctrine is laid down in *Rexroth v. Coon*, 15 R. I. 35, 2 Am. St. Rep. 863, wherein it is said that, excepting game laws and statutory regulations, the law in this country with regard to property in animals *ferae naturae* is substantially in accord with that of England. The law touching the right of several fishery is the same. In *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146, it is said: "By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water, where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there. * * * Within these limits, by the common law, his right of fishing is sole and exclusive, unless restricted by some local law or well established usage of the State where the premises may be situate.

This right to take fish within the limits of one's land bounding upon and including a stream not navigable is so far,

a subject of distinct property or ownership that it may be granted, and will pass by a general grant of the land itself unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land; or the land may be granted while the grantor reserves the fishing to himself." See, also, *Bingham v. Salene*, Oreg. 208, 3 Am. St. Rep. 152.

We have thus referred to many authorities upon the question of such right of property as an incident to the ownership of the soil, because of the decisions in this country at first view apparently to the contrary, among which is one made by this Court in the case of *State v. Theriault*, 70 Vt. 617, 41 Atl. 1030. But upon a careful examination of that case and of the cases similar in principle, we do not think they are in conflict with the law here laid down. The sole question in *State v. Theriault* was, as considered, the constitutionality of the law regulating the right of the owner of land to fish on his own premises. The law was upheld as a proper exercise of the police power, under the provisions of the Constitution. Therein it is said that fish are *ferae naturae*, and the common property of the public, or the State, in this country. And a quotation is given from Blackstone to the effect that the generality of those animals which are said to be *ferae naturae*, or of a wild and untamable disposition, are among those things which, notwithstanding the introduction and continuance of property, must remain common. Which things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if they escape, or he abandons them, they return to the common stock, and any one else has an equal right to seize and enjoy them, as in them only a usufructory property is capable of being had. But this principle, when applied to the concrete case, involving the rights of the owner of the soil on

which such animals are found and taken, against a trespasser who there takes them, must be construed in connection with the law, that such owner has the exclusive right of hunting and fishing upon his own private grounds, and the right of property in the animals arises therefrom; in which case the latter principle governs. To state it otherwise, the general ownership is in the people in their united sovereignty; but when such animals go upon private grounds, then the qualified or special right of property in the owner of the soil attaches by virtue of his exclusive right to hunt, kill, or capture them while there; and this upon the principle that property which a person has a special right to acquire to the exclusion of others, is private property. Indeed, qualified property in chattels is an exception to the general right, and means a temporary or special interest, liable to be totally divested on the happening of some particular event. 2 Kent's Com. 427. And so seems to be the law as laid down by Mr. Serjeant Stephens, for, after stating that if a man start any animal on his own ground, and follow it into another's, and kills it there, the property remains in himself; but if (being a trespasser) he start it on another's land, and kills it there, the property belongs to him in whose ground it was killed; and again, if it be started by a stranger in one man's chase or free warren, and hunted into another liberty, the property is said to continue in the owner of the chase or warren, he says: "These distinctions seem to show that in general the property is acquired by the seizure or occupancy, though that cannot prevail against the better claim of him in whose grounds the animal is both killed and started, and who, therefore, may be said to be entitled *ratione soli*; or of him who has already a qualified property in it, *ratione privilegii*." 2 Steph. Com. 20-21. Nor was it differently understood in that case; for the exclusive right in the owner of the soil over which a brook

flows to catch fish therein, under regulations made and provided by the General Assembly, is recognized; and further referring to Blackstone, it is said that the same writer more fully treats of this class of common property and the rights of individuals therein in chapter 25 of the same book, and there lays down the principle that an individual may acquire or have a qualified property in such animals, among other ways, "on account of his special right or privilege of capturing and killing them in exclusion of other persons," which special right "does not exist in this country, except as limited by ownership of the place from which they are taken and the right to exclude others therefrom." Again in support of the doctrine there laid down a quotation is given from the case of *Peters v. State of Tenn.*, 33 L. R. A. 114, in which this qualified right of property incident to the sole and exclusive right of fishing is stated.

An important case, having some bearing upon this question, was recently before the Supreme Court of the United States. In *Geer v. State of Conn.*, 161 U. S. 519, 40 L. Ed. 793, the case was in error to the Supreme Court of Errors of the State of Connecticut to review a judgment of that Court affirming the judgment of a lower Court convicting the plaintiff in error of unlawfully receiving and having in his possession with intent to transport beyond the State certain woodcock, grouse, and quail killed within the State. By the statutes of Connecticut, the open season for game birds mentioned therein was from the first day of October to the first day of January; and the birds which the plaintiff in error was charged with unlawfully having in his possession for the purpose of unlawful transportation, were alleged to have been killed during the open season. The Court, speaking through Mr. Justice WHITE, reviewed

the civil and the common law touching the ownership of animals *ferae naturae*, the nature of property in game, and the authority which the State had lawfully to exercise in relation thereto. In sustaining the constitutionality of the law, as within the police power, the Court said that from the earliest traditions the right to reduce animals *ferae naturae* to possession had been subject to the control of the law-giving power. It was held that for the purpose of exercising this power or control, the State represents its people, and the ownership is that of the people in their united sovereignty. But the qualified right of property is recognized by both the civil and the common law. After quoting from the civil law, it is said: "No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game of which he was the owner, in common with other citizens, to possession, although the Institutes of Justinian recognize the right of an owner of land to forbid another from killing game on his property, as indeed this right was impliedly admitted by the Digest in the passage just cited."

It is further said that "Blackstone, whilst pointing out the distinction between things private and those which are common rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such rights." And quoting from Blackstone, it is said: "a man may lastly have a qualified property in animals *ferae naturae*, *propter privilegium*; that is, he may have the privilege of hunting, taking, and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and he may restrain any stranger from

taking them therein; but the instant they depart into another liberty, this qualified property ceases."

Nor is such qualified or special right of property without reason. Animals *ferae naturae* are of chattels classed in law as things personal which partake of the quality of things real, and are ranked as parcel of the freehold, because necessary to the well-being of the inheritance; and if the owner die intestate seized of an estate of inheritance in the land, the property rights in such animals at liberty thereon, as a general rule, descend with the inheritance to the heir, instead of belonging to the personal representatives of the deceased. Co. Litt. 8 a; *Case of Swans*, 7 Rep. 175; 2 Stephen's Com. 6. And in *Blades v. Higgs*, before cited, it is said by Lord CRANWORTH that wild animals are not the subject of larceny; but that they partake, while living, of the quality of the soil, and are, as growing fruit is, considered as part of the realty. This clearly shows that the right owned by the plaintiff of shooting, trapping and fishing on the *locus in quo*, constitutes in law a *profit a prendre*, which consists of a right to take a part of the soil or produce of the land in which there is a supposable value. 2 Washb. Real Prop. 25.

In *Wickham v. Hawker*, 7 Exch. 62, Baron PARKE, delivering the opinion, said that the liberties to hawk, hunt, fish and fowl, granted to one, his heirs and assigns, were interests, or *profits a prendre*. And in *Ewart v. Graham*, before cited, where such a right was under consideration and upheld under a reservation in a deed given by the owner of the soil, Lord Chancellor CAMPBELL, referring to *Wickham v. Hawker* as a case wherein the nature of the right in question was exceedingly well explained, and from which it appeared to be an interest in the realty which is well known to the law, said: "The property in animals *ferae naturae*, while they are on the soil,

belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth; that right may be granted by the owner of the fee simple, and such a grant is a license of a *profit a prendre*."

But usually there is a difference between an interest or profit to be taken or had in another's soil and an easement in another's soil. One of the distinguishing features of an easement is the absence of all right to participate in the profits of the soil charged with it; and another, that there must be two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. While the right to profits, termed *profit a prendre*, consists of a right to take a part of the soil or produce of the land, in which there is a supposable value. *Gateward's Case*, 6 Co. Rep. 59, 10 Eng. Rul. Cas. 245; *Pierce v. Keator*, 70 N. Y. 419. Mr. Washburn, however, lays down the rule that "This right of *profit a prendre*, if enjoyed by reason of holding certain other estate, is regarded in the light of an easement appurtenant to an estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same." Washb. Eas. 8. And in *Post v. Pearsall*, 22 Wend. 425, it is said that "a *profit a prendre* in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land itself." There being nothing in the case at bar indicating that the plaintiff's right was granted in favor of any dominant tenement, or enjoyed by reason of holding any other estate, we think it clear that the plaintiff's right is not an easement merely, but that it is a right of profit in the land of another, and therefore an interest in the land itself.

And so it was held in the next two cases cited, where practically the same contention was made as is made in the case at bar. In *Webber v. Lee*, 9 Q. B., the action was brought to recover damages for breach of a verbal contract professing to give a right to go on certain grounds and exercise the right of sporting over them and to carry away a definite portion of all the game killed. The question was whether it was an agreement to grant a right over coupled with an interest in the land, or only an agreement for a license to go on the lands. It was held that the right to kill and take away game is a *profit a prendre*, and an agreement for the enjoyment of it is a contract for an interest in land, and therefore within section 4, of the Statute of Frauds. In *Bingham v. Salene*, before cited, the plaintiffs held a grant to them their heirs and assigns, forever, from the defendants of "the sole and exclusive right, privilege, and easement to shoot, take, and kill any and all wild ducks and other wild fowl upon and in any and all lakes and sloughs and waters situate, lying, or upon" the defendant's lands, etc. This suit was brought to enjoin the defendants from interfering with the alleged exclusive right and privilege, and to restrain them from inviting or allowing any other person or persons on said lands for the same purpose. The defendants contended that the grant to the plaintiffs created nothing but a license. It was held that the right in the plaintiffs was exclusive, and that the grant created not a mere license, but an interest in the land itself. The right of fishing in non-tidal waters is of the same nature in law. This was discussed to some extent by this Court in *New England Trout and Salmon Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569. In stating the common law of England, it is said that "the right of fishing in non-tidal waters by one not the owner of the soil thereunder is not an easement, but a right of profit in the land of another." See, also, to the

same effect, *Cobb v. Davenport*, 32 N. J. L. 369; s. c. 33 N. J. L. 223, 97 Am. Dec. 718; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405.

Although the common law touching some of the questions here discussed is somewhat modified by the provisions of the Constitution, Ch. 2, s. 40, as seen by the cases before cited of *New Eng. Trout and Salmon Club v. Mather*, and *State v. Theriault*, and by *Payne v. Gould*, 74 Vt. 208, yet the questions before the Court are so little affected by such modifications that it is unnecessary further to notice them here.

It follows that, although the plaintiff is not the owner of the land, yet he has a separate and exclusive interest in the soil for a special purpose. It is not necessary, however, in the view we take of the statute, to consider whether this brings the plaintiff within the principle that, where a person has a separate interest in the soil for a special purpose, even though the right to the land is not in him, yet, if he be injured in the enjoyment of the particular use, he may maintain trespass *quare clausum fregit*. 2 Wat. Tresp. 135; *Crosby v. Wadsworth*, 6 East, 602; *Dolloff v. Danforth*, 43 N. H. 219; *Holforth v. Bailey*, 12 Q. B. 426, 66 Eng. C. L. 425.

V. S. 4626 is a part of the laws of this State enacted for the preservation of fish and game. The law of that section was designed not so much to punish trespassers upon land merely for the trespass committed, as to protect the owner of lands within the State in his exclusive right of catching fish, and of trapping, hunting and killing game upon his own premises, provided he complies with the conditions therein prescribed. The spirit of the law requires that it be so construed as to give the same protection to anyone having such exclusive right, whether he be the owner of the soil, or, as in this in-

stance, the owner of the right, exclusive of the soil except such interest therein as is within the right.

It is to be presumed that the makers of the law knew that the ownership of the soil and the ownership of such a right might legally be in different persons. And we think the intended scope of the law is sufficient to cover either.

The word "owner" does not always import an absolute owner, as the owner in fee simple of real property. Its meaning is often varied according to the connection in which it is used, and it is to be understood according to the subject matter to which it relates. *McFeters v. Pierson*, 15 Col. 201, 22 Am. St. Rep. 388.

Nor does the fact that the forfeiture named in the statute is to be recovered in addition to the damages sustained by the entry upon the land, show the law inapplicable to any "owner" other than the owner of the property upon which the entry is made. Under the law, the land must be inclosed by a fence or something equivalent thereto, and have notices posted upon it. The owner of the right to fish, trap, and hunt, by so inclosing it, may be the owner of the fence. The notices required may have been posted on the land at his expense, and owned by him. He may have traps, decoys, hides, and other suitable and proper conveniences upon the land for use in the legitimate exercise of his right. In such circumstances, can it be said that he may not sustain actual damages by a person's wilfully entering upon the land for the purpose of fishing, trapping, or shooting thereon? Furthermore, suppose the owner of the freehold wilfully enters upon the land without license for the same purpose. If the defendant's contention is sound, such owner could not be subject to prosecution under the statute in question, for the sole reason, if for no other, that he could not be both plaintiff

and defendant in the same suit. Such a construction might defeat the object of the law, rather than to effectuate it.

But it is urged that the statute is penal, and therefore it should receive a strict construction. No new cause of action is created by the statute. In the same circumstances, the plaintiff has a right of action at common law. Under the statute the forfeiture is given to the party aggrieved not as a penalty, but as cumulative damages for his injuries suffered.

The fact that the sum named is denominated a forfeiture, and is a specified sum, is not controlling in determining the nature of the statute. The law as laid down in *Burnett v. Ward*, 42 Vt. 80, *Newman v. Waite*, 43 Vt. 587, and *Spaulding v. Cook*, 48 Vt. 145, seems conclusive that the statute is remedial and not penal.

Holding, as we do, that the plaintiff is the "owner" within the meaning of the statute in question, it is not necessary to decide what kind of action would be his proper remedy under the rules of the common law; for the right to bring an action of trespass is given him by statute. *Parmenter v. Caswell*, 53 Vt. 6.

Judgment affirmed, and cause remanded.

FREDERICK GODFREY, COLLECTOR, v. BENNINGTON WATER
Co., and Tr.

May Term, 1903.

Present: TYLER, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 1, 1903.

Taxation—Exemption—Public Use—Water Company—Abstract of individual lists—Due process of law—Curative statute.

The property of a private corporation, used for the purpose of supplying the inhabitants of a municipality with water for domestic and other purposes, is not exempt from taxation under V. S. 362.

The abstract of individual lists required by V. S. 427, must include the real estate of the tax payers, and the failure of the listers to file the same as therein provided invalidates the whole grand list.

Such failure deprives the tax payer of his constitutional right to be heard, and the grand list cannot be made valid by a curative statute.

ASSUMPSIT FOR TAXES. Plea, the general issue. Heard on the report of a referee, at the December Term, 1902, Bennington County, *Munson, J.*, presiding. Judgment for the defendant. The plaintiff excepted.

Barber & Darling for the plaintiff.

The failure of the listers to file the abstract only invalidates the grand list so far as the personal property is concerned. *Smith v. Hard*, 59 Vt. 13; *Bartlett v. Wilson*, *Id.* 23.

The statute does not require the real estate to be included in the abstract, and the property here assessed is real estate. *Willard v. Pike*, 59 Vt. 202; *Tyler v. Moore*, 63 Vt. 60; *Stiles v. Newport*, 76 Vt.

The property was not used for public purposes. *Stiles v. Newport, supra*, and cases cited.

The defects in the grand list were cured by the legalizing act. *Smith v. Hard, supra*.

Batchelder & Bates for the defendant.

The context and course of legislation show that it was intended that the abstract should include real estate. The abstract affords the means of knowledge to the taxpayer and forms the basis of the taxpayer's right to be heard. *Stewart v. Palmer*, 74 N. Y. 183; *People v. Mayor*, 4 N. Y. 419; *Baltimore v. Harris*, 26 Md. 194; *Waterman v. Davis*, 66 Vt. 754.

The provision for the abstract is made for the taxpayer's protection, and is mandatory. *Smith v. Hard*, 59 Vt. 21; *Wittham v. Butterfield*, 6 Cush. 221; *Cahoon v. Coe*, 57 N. H. 556; *Woodhouse v. Burlington*, 47 Vt. 300.

The curative statute did not reach this defect in the grand list. *Cooley Const. Lim.* 370; *Cooley Tax.*, 302, 304; *Land Co. v. Soper*, 39 Ia. 112; *Railroad Co. v. Commissioners*, 84 N. C. 504; *Marsh v. Chestnut*, 14 Ill. 223; *In re Church*, 66 N. Y. 395; *People v. Brooklyn*, 71 N. Y. 495; *Howes v. Bassett*, 56 Vt. 141.

The defendant's water system is exempt from taxation under the first clause of subdivision 7, section 362, of Vermont Statutes. *Water Co. v. Winans*, 26 Am. St. 813; *Talbot v. Hudson*, 16 Gray, 417; *In re Association*, 66 N. Y. 567; *In re Company*, 108 N. Y. 375; *Smeaton v. Martin*, 57 Wis. 364; *Tyler v. Beecher*, 44 Vt. 648; *Lewis Em. Dom.*, s. 158; *Stewart v. Supervisors*, 1 Am. Rep. 238; *Railroad Co. v. Burlington*, 28 Vt. 193; *Water Co. v. Forbes*, 62 Cal.; *Worcester v. Railroad Co.*, 4 Met. 564.

WATSON, J. The defendant is a private corporation organized under the Laws of 1886, No. 172, and amendments thereto, "for the purpose of furnishing the inhabitants of the town and village of Bennington with water for domestic and other purposes." The property taxed consists of the defendant's water works, constructed under its charter, and used for the purpose named therein. The taxes here sought to be collected were assessed under the vote of the town in the years 1898 and 1899.

It is contended by the defendant that in granting it the right to construct a water system for the purposes stated in its charter, the Legislature created in the defendant a public trust, and that the power therein delegated to it is a right granted to construct a system dedicated exclusively to a public use. By reason whereof the defendant contends that its plant is exempt from taxation under subdivision 7, section 362, of Vermont Statutes, which provides that "Real and personal estate granted, sequestered, or used for public, pious, or charitable uses" shall be exempt from taxation.

Upon this question, our attention has been called to many decisions of Courts in other jurisdictions; but we have given them no consideration for the reason that practically the same question has recently been before this Court in *Stiles v. Village of Newport*, where it received full and careful consideration. There the village of Newport was authorized to provide a supply of water for fire, domestic, and other purposes, and to sell and furnish water for domestic and other purposes, to persons or corporations within or without the municipal limits. A part of its water system, including reservoir and aqueduct, was in the town of Derby. The village used its water for municipal purposes and to supply its inhabitants for domestic use; it supplied the village of West Derby, a manufacturing establishment

there located, and two properties in that town outside the village limits, with water for protection against fire, and the inhabitants with water for domestic purposes. For all the water thus supplied the village of Newport received a compensation.

That part of the system located in Derby was set in the grand list of that town, and the suit was brought to collect the tax assessed thereon. It was contended, as in the case at bar, that it was property used for public purposes, and therefore exempt from taxation under V. S. 362, subdivision 7, above quoted. It was held that the furnishing of water by a municipality to its inhabitants for domestic purposes, as well as the furnishing of it for protection against fire and for sanitary purposes, within its own territorial limits, was a public use within the meaning of the law. But that, when water was supplied for such purposes outside the municipal limits, the same rules of law did not apply, because the duty of a municipality regarding the maintainance of mains and hydrants, and the municipal relation entering into the question of domestic supply are confined to its own territorial limits. It was further held that as the village of Newport had no interest in the village of West Derby and owed no municipal duty to its inhabitants, the sale of water there, even for such purposes, was solely for revenue, and that the sale was not a public use within the meaning of the law; and that its property, to the extent that it was so put to private use in Derby, was there taxable.

Under this holding, a municipality when outside its own limits furnishing water to another municipality and its inhabitants for revenue becomes as an individual or a private corporation carrying on the business in the same way, and therein it is governed by the same rules of law. The law there laid down is decisive of the case before us that the furnishing of water by the defendant under the provisions of its charter does

not constitute a public use, and that its property is therefore not exempt from taxation.

It is found that in neither of the years in which the taxes in question were assessed did the listers lodge in the town clerk's office an abstract of the "individual list" of all the taxpayers of the town, as required by V. S. 427. The plaintiff contends, (1) that only the personal estate is required to be included in such abstract, and hence the omission to lodge the abstract in the town clerk's office does not affect the grand list as to real estate; and (2) that, if real estate is to be included, the defect in the year of 1898 was validated by the curative act of that year, Laws of 1898, No. 283.

That the property taxed is real estate, no question is made. But the defendant contends that the abstract of the individual lists must contain the real estate as well as the personal property of the taxpayers to be a compliance with the law.

By the Laws of 1880, No. 78, Sec. 15, the listers were required to arrange in alphabetical order, and lodge in the town clerk's office on or before the twenty-fifth day of April of each year the "personal lists" of all taxpayers for their inspection. That act in this respect was said in *Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321, to have reference to the personal estate.

By the Act of 1882, No. 2, Sec. 20, the law was so changed as to require an abstract of the "individual list" of the taxpayers thus to be lodged in the town clerk's office instead of the "personal lists" as before. This act was amended by Laws of 1890, No. 13, by adding thereto that the listers of a town of less than two thousand inhabitants may make up such abstract by entering in the blank books furnished by the State for the grand lists of such town, for that year, under the proper headings, the polls, the real estate, and the ap-

praisals of the same, and the appraisal of the personal estate, as required by law to be set in the list. And that after the first Tuesday in May, when all questions of persons aggrieved have been heard and determined, the listers shall complete said book as the grand list of the town. The Act of 1882, thus amended, became Section 427 of Vermont Statutes.

If it could be said that any doubt existed whether the law of 1882 required real estate to be included in such abstract, certainly the Act of 1890 shows clearly that the intent of the Legislature was to include it. Furthermore, the purpose of the law could not be subserved without including it. It is true that a general appraisal of real estate is made only once in four years, yet, if additional buildings have been erected, or extensive repairs made, the listers shall make such addition to the general appraisal of such real estate as they deem just; and in like manner, they shall make deductions for large depreciations in value by reason of fire, flood, or other accident, or by cutting or removing timber therefrom; and if there has been any great change in the value of quarries where stone is quarried, they shall change the appraisal thereof accordingly. Laws of 1896, No. 13. Also, if any taxable real estate was omitted from the last quadrennial appraisal, the listers shall appraise the same, and set it in the list. V. S. 419. And if there has been a change of ownership, the real estate must be set to the last owner on the first day of April.

With such duties devolving on the listers every year, the importance of the provision requiring the abstract to include both the real and personal property is apparent. When taxes are levied on property according to its value, to be fixed by the listers, in estimating the value the listers act judicially, and the taxpayers must have an opportunity to be heard. When the abstract of the individual lists is lodged in the town clerk's

office for the inspection of the taxpayers, as required, it is legal notice to them of the determination of the listers respecting the list of every individual taxpayer in town, and any person feeling himself aggrieved thereby, and desiring to be heard by them, may have such hearing under the provisions of V. S. 428. A person may appeal from the decision of the listers, and be heard by the board of civil authority. V. S. 429. When these different provisions of the statutes are complied with, a taxpayer is not deprived of his property without due process of law. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. ed. 569.

In the case at bar, since there was no abstract of the individual lists lodged in the town clerk's office, the defendant was given no opportunity to be heard, and to hold the taxes assessed against him valid would be taking property without due process of law. *Cooley Tax'n.*, 264-268; *Bartlett v. Wilson*, 59 Vt. 23; *Heth v. Radford*, 96 Va. 272, 31 S. E. 8.

The right of an opportunity to be heard being constitutional, the Legislature could not, in the first instance, nor by a curative statute deprive a taxpayer of it. *Bartlett v. Wilson*; *Grout v. Johnson*, 73 Vt. 268, 50 Atl. 1059.

Judgment affirmed.

ALICE R. PHILLIPS v. CHARLES DEF. BANCROFT and CITY OF
MONTPELIER.

May Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 1, 1903.

*Collection of taxes—Injunction—Fraudulent assessment—
Jurisdiction.*

The determination of the board of civil authority on an appeal from the decision of the listers is a final judgment, not subject to collateral attack; and equity will not interfere to restrain the collection of the taxes, upon allegations of fraud relating solely to the action of the listers in making the original assessment.

APPEAL IN CHANCERY. Heard on defendant's demurrer to the bill, at the March Term, 1903, Washington County, *Stafford*, Chancellor. *Pro forma* decree sustaining the demurrer and dismissing the bill. The oratrix appealed.

Edward H. Deavitt for the oratrix.

The oratrix is entitled to equitable relief. *Cooley Tax.*, 219, 784, 785; *Spelling Ex. Rel.*, s. 641; *Judson Tax.*, ss. 466, 473, 553; and cases cited by these authors.

It is the allegation of fraud which gives this Court jurisdiction. *Railroad Co. v. Cole*, 57 Ill. 591; *DuPage County v. Jenks*, 65 Ill. 75; *Lefferts v. Supervisors*, 21 Wis. 688; *Railroad v. Nolan*, 48 N. Y. 513; *State v. Railroad Co.*, 7 Nev. 99; *Howes v. Bassett*, 56 Vt. 141; *Pelton v. Bank*, 101 U. S. 143.

Frederick P. Carleton for the defendants.

The oratrix has an adequate remedy at law. *Babcock v. Granville*, 44 Vt. 325; *Henry v. Chester*, 15 Vt. 460; *Allen v. Burlington*, 45 Vt. 202.

If the listers acted fraudulently she has an action against them. *Fuller v. Gould*, 20 Vt. 643; *Wheeler v. Marsh*, 34 Vt. 352.

Her allegations of fraud do not entitle her to equitable relief. *Cooley Tax.*, 760.

WATSON, J. The oratrix, a resident of Montpelier, seeks an injunction against the collection of taxes assessed against her by the city of Montpelier on the list of 1902. It is contended that the allegations in the bill show such a fraudulent assessment by the listers in making up her list as renders the list, and consequently all taxes assessed thereon, invalid; also that, by reason of the fraud thus shown, a Court of equity has jurisdiction, and in such circumstances an injunction will issue. The allegations in substance are that the oratrix omitted to make out, swear to, and deliver an inventory to the listers for the sole reason that she owned no property there taxable; and that the listers, without making any demand on her for such inventory, made up her list by assessing her the sum of five thousand dollars, thereby making her list fifty dollars. The bill then contains allegations upon which the oratrix relies as showing the fraudulent acts of the listers in making the assessment. The bill further shows that after the list was so made, the oratrix was given notice thereof as the law requires, and she, feeling aggrieved by the action of the listers and their appraisal, appeared before them for hearing thereon; but upon such hearing they refused to make any change in the list thus made, that thereupon the oratrix appealed to the board of civil authority; and that a hearing was had before this board and

the actions of the listers in the premises were sustained by it.

Under the provisions of the law, a person who feels aggrieved by the action of the listers and desires to be heard by them, may have such hearing. The listers shall "hear persons aggrieved by their appraisal or by any of their acts, until all applications are heard and decided, and correct the list accordingly." V. S. 427, 428, 451. But when a person's list is made under the provisions of section 424, the listers shall have no power to reduce the same below the amount made by doubling the appraisal as therein provided. The board of civil authority is given appellate jurisdiction of the matters thus heard by the listers, and it "shall hear and determine such appeal, and shall order the list to be corrected accordingly." V. S. 429. But no relief can be had by a person before it unless it is satisfied that he has not wilfully violated any of the provisions of V. S. Ch. 29, which relates to grand lists.

The action of the listers in making the assessment and in the hearing before them was judicial, and, unappealed from, constituted a judgment. But on appeal the questions were open to be heard by the board of civil authority upon such evidence as should be adduced before it.

That questions regarding the acts of the listers of which the oratrix now complains were within the jurisdiction of the board of civil authority on appeal is not questioned. Indeed, the allegations of the bill are that a hearing was had before said board upon these questions, and that it voted and determined to sustain the action of the listers in making up the oratrix's list. No further appeal is provided for by statute. It follows that the determination of the board of civil authority in the premises is a final judgment, not subject to collateral attack. *Weatherhead v. Guilford*, 62 Vt. 327, 19 Atl. 717; *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652.

The allegations of fraud relate solely to the actions of the listers in making the assessment. No fraudulent acts by them subsequent to the assessment are alleged, nor by the board of civil authority at any time. There being no allegation to the contrary, the presumption is that at the hearing before the listers, and at the hearing before the board of civil authority, everything was rightly and duly performed, and that the decision of each board was well founded and its judgment regular. Broom's Leg. Max. 945.

When such hearings are had by a taxpayer, and the matters under consideration are honestly determined by the official boards in the faithful performance of their duties, allegations of fraudulent acts by the listers in assessing such taxpayer in making up his list under the provisions of section 424, in the first instance, are not sufficient to give a Court of equity jurisdiction. To enjoin the collection of these taxes is to enjoin the judicial determination of a tribunal that had jurisdiction to hear and determine the matters and things which entered into it,—the judgment on which the taxes were assessed. "The only question of fraud," says Mr. Story, "which is open to examination in a Court of equity, as a ground for enjoining the judgment of any Court having jurisdiction of the case, whether domestic or foreign, is such as intervened in the proceedings by which the judgment was obtained. All questions prior to the proceedings by which the judgment was obtained, are necessarily concluded by it." 2 Story Eq. Jur., sec. 1582. See, also, *Camp v. Ward*, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929; *Mayor, etc. v. Brady*, 115 N. Y. 599, 22 N. E. 237.

The pro forma decree is affirmed and cause remanded.

FRANK D. THOMPSON, TRUSTEE, v. HENRY FAIRBANKS.

May Term, 1903.

Present: TYLER, MUNSON, STANT, WATSON and HASELTON, JJ.

Opinion filed August 1, 1903.

Chattel mortgage—After acquired property—Validity—Taking possession under—Bankruptcy—Fraudulent transfer—Preference—Sufficiency of description of debt.

A chattel mortgage on after-acquired property, under which the mortgagee has taken possession of such property with the mortgagor's consent, is valid against the mortgagor's trustee in bankruptcy, in the absence of an express finding that such possession was taken for the purpose of affording a preference, though possession was so acquired within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge that the mortgagor was insolvent and contemplating bankruptcy proceedings.

This result is not prevented by the fact that when the mortgagee took possession of the property, it was subject to an attachment which was invalidated by the bankruptcy proceedings.

Nor does the mortgagor's consent to such taking of possession amount to a fraudulent transfer of such property, in the absence of an express finding to that effect.

Such possession does not amount to a lien created by legal proceedings.

A condition in a common law chattel mortgage that the mortgagor shall pay all that he then owed the mortgagee, or might thereafter owe him "by note, book account, or in any other manner," is sufficient to cover a claim for rent subsequently accruing.

A condition in such a mortgage that the mortgagor shall save the mortgagee "harmless and indemnified from paying any commercial paper on which he has become, or may hereafter become, holden in any manner" for the mortgagor's benefit "as surety, endorser, or otherwise," is sufficient to cover an outstanding note subsequently signed by the mortgagee as surety for the mortgagor, though the mortgagee has not paid it.

The sufficiency of the description of the debt secured by a common law chattel mortgage is determined by the rules applicable to real estate mortgages.

GENERAL AND SPECIAL ASSUMPSIT. Plea, the general issue with notice of special matter. Heard on the report of a referee, at the December Term, 1902, Caledonia County, *Watson, J.*, presiding. *Pro forma* judgment for the defendant. The plaintiff excepted.

Porter & Thompson for the plaintiff.

Under the Bankruptcy Act of 1898, the trustee is the representative of the creditors. *In re Pekin Plow Co.*, 112 Fed. 308; *In re Booth*, 98 Fed. 975; *In re Yukon Woolen Co.*, 96 Fed. 326; *In re Howland*, 109 Fed. 869.

The mortgage in question was void for want of proper description of the property. It leaves the determination of the specific property resting exclusively in the minds of the parties. *Parker v. Chase*, 62 Vt. 206; *Huse v. Estabrooks*, 67 Vt. 223. It does not appear from the mortgage in what town the property is located, and it is found that other property of the same kind was kept on the premises, so mixed with the mortgaged property that only the mortgagor, or some one having equal knowledge, could identify it. *Jaffrey v. Brown*, 29 Fed. 476; *Stroud v. McDaniel*, 106 Fed. 493.

The mortgage was invalid as to the after-acquired property. *Peabody v. Landon*, 61 Vt. 318; *In re Allen's Est.*, 65 Vt. 392; *Moody v. Wright*, 13 Met. 17.

The description of the debt and the affidavit were not in conformity with the law. *V. S.* 2253, 2255; *Tarbell v. Jones*, 56 Vt. 312; *Sherman v. Organ Co.*, 69 Vt. 355; *Nichols v. Bingham*, 70 Vt. 320; *Page v. Ordway*, 40 N. H. 253; *Phillips v. Johnson*, 64 N. H. 393; *Ehler v. Turner*, 35 N. J. Eq. 68; *Receiver v. Spielman*, 50 N. J. Eq. 120; *Thropp v. Knight*, 28 Atl. 1037.

The Ryan attachment prevents the defendant's possession from making this mortgage valid. When Moore was adjudged a bankrupt, the attachment was released, so the property, by operation of law, passed to the plaintiff. *In re Andrae Co.*, 117 Fed. 561; *Beamer v. Truman*, 84 Cal. 554.

The defendant's taking possession in the way he did constituted a preference. Bankruptcy Act, ss. 60a, 60b. Under this statute the intent of the parties cuts no figure. *Wilson Bros. v. Nelson*, 183 U. S. 191; *In re Sheridan*, 98 Fed. 406; *Babbitt v. Kelley*, 70 S. W. 384; *Landis v. McDonald*, 88 Mo. App. 338; *Matthews v. Hardt*, 6 A. B. R. 373; *In re Klingaman*, 101 Fed. 691.

The rent was not secured. *Nichols v. Bingham*, 70 Vt. 320.

The Passumpsic Savings Bank note is not secured. The defendant's liability thereon is not sufficiently described in the mortgage, and he has not paid the note. All claims turn upon their status at the time of filing the petition. *In re Bingham*, 94 Fed. 766.

The officer paid the defendant \$126.62 more than his claim, which sum the plaintiff is entitled to recover.

Jonathan Ross and Harry Blodgett for the defendant.

By suing for the avails, the plaintiff ratifies the mortgage and sale. *Perry v. Shumway*, 73 Vt. 191; *Farrar v. Powell*, 71 Vt. 247; *White v. White*, 68 Vt. 161; *Bishop v. Catlin*, 28 Vt. 71.

The mortgage of 1891 was valid. *Smith v. Aikins*, 18 Vt. 461; *Bellows v. Wells*, 36 Vt. 599; *Moody v. Wright*, 46 Am. Dec. 706; *Mitchell v. Winslow*, 2 Story, 230.

It was certainly valid against the plaintiff after possession was taken under it. *Peabody v. Landon*, 61 Vt. 318; *Francisco v. Ryan*, 56 Am. St. Rep. 711, and note.

The transfer of possession was not a preference. *Sabin v. Camp*, 98 Fed. 974; *Walker v. Brown*, 165 U. S. 654; *Ketchum v. St. Louis*, 101 U. S. 306; *Rice v. Hewett*, 63 Vt. 321; *Desany v. Thorp*, 70 Vt. 31; *McLoud v. Wakefield*, 70 Vt. 558.

The description of the debt is sufficient. *Parker v. Chase*, 62 Vt. 206.

The description of the property is sufficient. *Bank v. Fittz*, 67 Vt. 57.

WATSON, J. Sometime before June 22, 1886, the bankrupt, Herbert Moore, bought a livery stock and business in St. Johnsbury Village. In part payment therefor, he assumed a mortgage then outstanding on the property. The business then was and continued to be carried on in buildings leased of the defendant. Shortly before March 1, 1888, the defendant assisted Moore to pay the assumed mortgage by signing a note with him for \$1,425, payable to the Passumpsic Savings Bank, of St. Johnsbury. Defendant also signed other notes with Moore,—one for \$350, dated July 15, 1890, payable to the same bank, and two notes payable to the First National Bank of St. Johnsbury, one for \$750, dated June 22, 1886, and one dated June 23, 1889. The sum for which this last note was given does not appear.

On April 15, 1891, Moore gave the defendant, as security, a chattel mortgage on the livery property, and it was recorded on the 18th day of the same month. The description of the property in the mortgage is: "All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes,

blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange." The mortgage is conditioned for the payment of all that the mortgagor then owed the mortgagee, or might thereafter owe him, "by note, book account, or in any other manner," and for the saving of the mortgagee "harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my (the mortgagor's) benefit as surety, endorser or otherwise."

On May 5, 1891, defendant signed another note with Moore, payable to the Passumpsic Savings Bank, and on March 1, 1900, the three notes given to that bank by Moore with the defendant as signer, as before stated, were merged in a note of that date signed by Moore and by the defendant as surety, for \$2,510.75, payable to the bank on demand. This note has not been paid, and, although specified in the conditions of the mortgage assigned to the bank, as one of the debts secured thereby, it has been proved by the bank as an unsecured claim against the bankrupt estate. The defendant signed other notes with Moore from time to time, in renewal and otherwise, payable to the First National Bank.

After deducting payments made on the notes to the last named bank, the aggregate sum due thereon was put into a new note dated Nov. 21, 1892, signed in the same way. This note, amounting to \$526.27, was paid by the defendant on June 4, 1900. These notes were all signed by the defendant to assist Moore in carrying on, building up, and equipping his livery stable and livery business, and as between them belonged to Moore to pay.

On March 5, 1900, Moore gave the defendant another chattel mortgage on the livery stock. Later in the same month, this mortgage was assigned by the defendant to the Passump-

sic Savings Bank, by which it has hitherto been held and owned. On May 7, 1900, one John Ryan, a creditor of Moore, issued his writ against him declaring in general assumpsit for \$500 in damages, and caused the livery stock to be attached thereon. On the 16th day of the same month, the defendant, acting under the advice of his attorney, and with the consent of Moore, took possession under his mortgage of April 15, 1891, of all the livery property then on hand, and on the 11th day of June following, he caused the same to be sold at public auction by a public officer in due form under the provisions of the statute. By arrangement between Moore's attorney and the defendant's attorney, the property was thus to be sold, and the avails held by the officer in place of the property for the one who should prove to be entitled thereto; but neither Moore nor his attorney consented that the avails might be applied on the defendant's debts. On the 30th day of June, Moore filed his voluntary petition in bankruptcy, he was adjudged a bankrupt thereon, and the plaintiff was appointed trustee in bankruptcy of the estate, and he is now acting as such

The petition in bankruptcy was filed within four months after the giving of the mortgage assigned to the Passumpsic Savings Bank; hence that mortgage became null and void under the Bankrupt Law of 1898, sec. 67, e. For the purpose of defeating the effect of defendant's taking possession of the property under his mortgage, the plaintiff brought his petition to the court of bankruptcy, under the provisions of sub-division f of that section, for an order that Ryan's attachment might be preserved as a lien on the property for the benefit of the estate in bankruptcy. But upon hearing, the petition was dismissed. Since the attachment was made within four months prior to the filing of the petition in bankruptcy,

the lien created thereby could be preserved only by an order from that court for such purpose. Without such order the attachment, like the last named mortgage, became null and void. Sec. 67, f. With the bank's mortgage and the attachment thus invalidated, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given, nor attachment made. It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of f. There would be more force in this contention were it not for the provision that by order of the Court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for on the dissolution of the attachment the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such an order is necessary. We think such is the purpose of that provision, and that unless the lien is thus preserved, the property, as in the case at bar, may be held upon some other lien and not pass to the trustee. *In re Sentenne & Green Co.*, 120 Fed. 436.

The question then arises whether the defendant, by virtue of his mortgage and the taking possession of the property thereunder, had a lien on the property taken and sold, paramount to the rights of the plaintiff as trustee under the bankrupt law. The plaintiff contends that the defendant did not have a lien valid against creditors under that Act, and he seeks to recover the amount received by the defendant from the sale of the property. The parties to the mortgage are described therein as of St. Johnsbury, etc. Beyond what may be in-

ferred from this fact, there is nothing in the mortgage showing where the property was located.

The referee found that at the time this mortgage was given, it was agreed and understood by the parties thereto that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby, and by purchase or otherwise, keep the stock good, so that the defendant's security should not be impaired; and that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein; that pursuant to such understanding and agreement, the mortgagor made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor, sometimes without communication with or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when defendant took possession of it was all acquired by exchange of the original stock, or with the avails of the old stock sold, or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

The plaintiff contends that the mortgage is void, because (1) the description of the property is insufficient; (2) in neither the condition nor the affidavit is the description of the debt as specific as the law requires; also that the mortgage was invalid as to the after-acquired property. However the law might be upon these questions if the mortgagor had retained possession of the property until after the filing of the petition

in bankruptcy, there would seem to be but little doubt regarding it as the case stands.

The property expressly described in the mortgage was the mortgagor's livery property, and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it with the consent of the mortgagor, it became a good and valid mortgage on the property, including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of its date, are questions too well settled in this State to need further discussion. *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 903; *Rice's Assignees v. Hulett*, 63 Vt. 321; *In re Allen's Estate*, 65 Vt. 392; *McLoud v. Wakefield*, 70 Vt. 558.

It is found that when the defendant took possession of the property, he knew that the mortgagor was insolvent, and was considering going into bankruptcy; that he did not intend to perpetrate any actual fraud on the other creditors or any of them; but that he did intend thereby to perfect his lien on the property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. He then understood that Ryan's attachment would

probably hold good against his mortgage. There is no finding that the thus parting with the possession of the property by the mortgagor was with the purpose on his part to hinder, delay, or defraud his creditors, or any of them. Without a finding to this effect, it cannot be said that there was an invalid transfer of the property within the provisions of section 67, e, of the bankrupt law. *Sabin v. Camp*, 98 Fed. 974.

The plaintiff further contends that such transfer constituted a preference within the meaning of that law. Section 60, subdivision a, declares what shall constitute a preference, and subdivision b provides that if a bankrupt shall have given a preference within four months before the filing of a petition, or after it is filed and before the adjudication, "and the person receiving or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." It is unnecessary, however, to determine whether the taking possession of the property by the defendant under his mortgage with the consent of the mortgagor was a preference under subdivision a, for if it was, it is not voidable by the trustee, under subdivision b, unless the defendant or his agent had reasonable cause to believe that it was intended thereby to give a preference. *Pirie v. Chicago Title and Trust Co.*, 182 U. S. 438, 45 L. ed. 1171.

The mortgage under which defendant acted was given more than seven years before the enactment of the bankrupt law. The case shows that possession was not taken until after the condition was broken, for it is found that at that time there was a balance due defendant on open account for rent overdue of \$269.19. As a mortgage under the common law, when the condition was not duly performed, the whole title to the

property vested absolutely at law in the mortgagee, subject to the mortgagor's right in equity to redeem, the same as in the case of a mortgage of lands. 2 Story Eq. Jur., sec. 1030; *Wood v. Dudley*, 8 Vt. 430; *Blodgett v. Blodgett*, 48 Vt. 32; And the defendant had the right to perfect his title against creditors of the mortgagor by taking possession of the property. *Coty v. Barnes*, 20 Vt. 78.

There is no finding that the defendant or his agent had reasonable cause to believe that by the change of possession it was intended to give a preference. This fact must affirmatively appear. We cannot infer it from the other facts reported. *Darby v. National Bank*, 57 Vt. 370. The fair construction of the findings is that the parties were but carrying out the provisions of the contract of mortgage as it was well understood between them before the bankrupt act was passed, with a view to their respective rights under the contract rather than that any preference was intended by either.

Nor does the property covered by defendant's mortgage pass to the trustee under the provisions of subdivision f, whereby all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, are deemed null and void in case he is adjudged a bankrupt, and the property affected thereby is deemed wholly discharged and released from such lien and passes to the trustee as a part of the estate.

The question of intent does not arise under these provisions, but to come within them the lien in question must have been obtained through legal proceedings within the prohibited period. It cannot be said that the creation of a lien is the same as the enforcement of one already created. Assuming that the taking and sale of personal property by a public offi-

cer upon a statutory chattel mortgage under the provisions of V. S. 2265-2268, constitutes a legal proceeding within the meaning of the above provisions of the bankrupt law, as was recently held by WHEELER, J., in the matter of *Parker P. Ball*, bankrupt, 123 Fed. 164, it does not follow that the mortgage lien is thereby rendered null and void; for instead of being a lien obtained through such legal proceedings, it is an existing lien by contract enforced by them.

As already seen, the defendant's lien under his mortgage at common law was one that gave him an absolute legal title after forfeiture, which occurred before possession was taken by him. But it was necessary that a change of possession be had to render his title operative against the other creditors of the mortgagor. *Tobias v. Francis*, 3 Vt. 425, 23 Am. Dec. 217; *Woodard v. Gates*, 9 Vt. 358; *Rice's Assignees v. Hulet*, before cited. After forfeiture the defendant had the right to sell the property in satisfaction of his debts. *Wood v. Dudley*, before cited; Jones Chat. Mort., sec. 707; *Freeman v. Freeman*, 17 N. J. Eq. 44. And the sale, being with the mortgagor's consent, operated as a formal foreclosure of his equitable right of redemption. Jones Chat. Mort., sec. 709.

The construction of section 67 f has recently been under consideration in the case of *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36. In an opinion delivered by Mr. Chief Justice FULLER, the Court said: "In our opinion, the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged thereupon but not otherwise. A judg-

ment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

Nor is the case of *Wilson v. Nelson*, 183 U. S. 191, 46 L. ed. 147, upon which the plaintiff relies, to the contrary. There Nelson borrowed a sum of money before the bankrupt law was enacted, and gave his promissory note therefor, with an irrevocable power of attorney executed by him attached thereto, authorizing any attorney of a Court of record in his name to confess judgment thereon after its maturity. After the passage of the bankrupt act, the owner of the note caused judgment to be entered upon the note and the warrant of attorney. Upon this judgment an execution was issued and the same was levied on Nelson's goods, which were subsequently sold, and the proceeds were applied in part payment of the judgment. These proceedings were wholly without Nelson's knowledge or consent. More than five days after the levy, but before the sale of the goods, a petition in bankruptcy was filed against Nelson and the sole question before the Court was whether he had committed an act of bankruptcy within the meaning of section 3, cl. 3, of the bankrupt law. In considering the case, the Court discussed to some extent the provisions of sec. 67, subdivision f. In that case, unlike the one at bar, no lien existed on the bankrupt's property until one was created by the levy of the execution, which brought it expressly within the terms of subdivision f. It is there said that the bankrupt act makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact; and that the levy, which was in a proceeding begun within the four

months, would be dissolved by the adjudication in bankruptcy, because its existence and enforcement would work a preference; and it was held that the debtor, by failing to vacate or discharge the preference within five days before the sale of the property on the execution, committed an act of bankruptcy.

Some or all of the amount due from the mortgagor to the defendant for rent of buildings accrued after the giving of the mortgage, and the plaintiff contends that so much thereof as did thus accrue is not covered by the mortgage, because rent is not a "contemplated loan and liability" within the meaning of that expression in the affidavit attached to the mortgage. But when the defendant is considered as standing upon a mortgage at common law, no affidavit is necessary; and regarding the sufficiency of the description of the debts, obligations, and undertakings, intended to be secured thereby, the rules governing similar questions arising in connection with real estate mortgages are applicable. Under the holdings of this Court in cases involving such mortgages, it is clear that the description in question is sufficient in this regard. *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Seymour v. Darrow*, 31 Vt. 122; *Soule v. Albee*, 31 Vt. 142.

Nor can we agree with the plaintiff's contention that the defendant cannot avail himself of this security to save him harmless and indemnified from paying the note for \$2510.75 at the Passumpsic Savings Bank, signed by him as surety, because the defendant's liability thereon is not more specifically described in the mortgage. In this respect the condition of the mortgage is more specific than the one before the Court in *Soule v. Albee*. There the condition was, "should also pay all sums that the petitioners or A. G. Soule should become liable to pay for Curtis B. Albee in consequence of signing or otherwise." This condition was held sufficient to cover an agree-

ment whereby the mortgagee, at mortgagor's request, verbally agreed with the mortgagor's debtor, who had been summoned as a trustee in a suit against the mortgagor, that if said debtor would pay his debt to the mortgagor, he, the mortgagee, would pay him whatever judgment should be rendered against him as trustee in that suit. Whether the description meets the requirements of the law regarding statutory chattel mortgages, we need not inquire. The defendant cannot be deprived of his security in that behalf until the note at the bank has been paid, or he has in some other manner been fully discharged or released as surety thereon.

In considering the questions before us, we have treated all evidence introduced by the plaintiff, to which defendant excepted, as properly in the case, without regard to its legal admissibility.

The pro forma judgment for the defendant to recover his costs is affirmed.

ELISHA N. GOODSELL v. RUTLAND-CANADIAN RAILROAD CO.,
ET AL.

October Term, 1902.

Present: ROWELL, C. J., TYLER, STARR, WATSON and STAFFORD, JJ.

Opinion filed August 3, 1903.

Lease—Description—Uncertainty—Possession—Parol evidence.

When the description in a conveyance of land, read in the light of the situation of the parties, the subject matter, and the surrounding circumstances, fails to designate the tract intended to be conveyed, the conveyance is void.

A lease which describes the premises as "beginning eighty rods easterly of the southwest part of my farm, and extending northerly to the north line of land owned by me, eighty rods east of the lake shore," is void for uncertainty.

Possession of a part of a tract under such lease, by one claiming the whole, will not be extended by construction.

An inherently insufficient description in a conveyance cannot be aided by parol.

APPEAL IN CHANCERY. Heard on the report of a special master, and defendant's exception thereto, at the August Term, 1902, Grand Isle County, *Munson*, Chancellor, after leave granted to file a supplemental bill. Decree for the orator. The defendants appealed.

Frederick H. Button and *James K. Batchelder* for the defendants.

The description in the orator's lease is so indefinite that he has no title to the "East Quarry." *Galvin v. Collins*, 128 Mass. 525; *Fullam v. Foster*, 68 Vt. 590; *Graves v. Mattison*, 67 Vt. 630; *Cummings v. Black*, 65 Vt. 76; *Clary v. McGlynn*, 46 Vt. 347; *Gilman v. Smith*, 12 Vt. 150; *Cutler v. Tufts*, 3 Pick. 272; *Woodward v. Nims*, 130 Mass. 70; *Lippett v. Kelley*, 46 Vt. 516.

Parol evidence was not admissible to aid the description. *Graves v. Mattison*, *supra*; *Railroad Co. v. Dyer*, 49 Vt. 74; *Rich v. Elliot*, 10 Vt. 210; *Jenks v. Morgan*, 6 Gray 448; *Allen v. Kingsbury*, 16 Pick. 235; *Harlow v. Thomas*, 15 Pick. 56.

Alfred A. Hall and *Jed P. Ladd* for the orator.

If necessary, the words "southwest part" used in the description in this instrument should be read "southwest point." *Cutting v. Stone*, 7 Vt. 475; *Williams v. Willard*, 23 Vt. 376; *Bundy v. Morgan*, 43 Vt. 46.

Parol evidence is admissible to aid the description. *Lowry v. Adams*, 22 Vt. 165; *Alger v. Canada*, 49 Vt. 109; *McKeough's Est. v. McKeough*, 69 Vt. 44; *Wing v. Gray*, 36 Vt. 261; *Proctor v. Wiley*, 55 Vt. 244.

The orator was in possession of the land intended to be conveyed, and the defendants took their title with notice of, and subject to, his rights.

START, J. The contention is over the right of the orator to compensation for stone taken by the defendants from the farm of E. B. Phelps, at a point that will herein be called the "East Quarry," and by them used in the construction of the Rutland-Canadian Railroad; and over the orator's right to an injunction restraining the defendants from continuing to take stone. The orator's right, if he has any, is dependent upon whether effect can be given to a lease from Phelps to him, wherein it is attempted to grant a right to quarry stone by the use of the following language: "The exclusive right of quarrying and taking away stone from a piece or parcel of land situate as follows, to wit, in the town of South Hero, Vt., beginning eighty rods easterly of the southwest part of my (meaning said Phelps') farm, and extending northerly to the north line of land owned by me, eighty rods east of the lake shore."

From this description of the premises, it is evident that the lessor intended to grant a right to quarry stone from some particular part or parcel of his farm, and that the lessee expected that he was acquiring such right; but the description of the place from which a right to quarry stone was intended to be granted is so indefinite that the place the parties had in mind cannot be ascertained, and for this reason, the lease is inoperative as against the defendants. There is nothing in the language used, when read in the light of the situation of

the parties, the subject-matter of the contract, and the surrounding circumstances, that enables us to locate the place on the farm from which a right to quarry stone was intended to be granted. The language of the grant, when read by itself, or in the light of the situation of the parties, the subject-matter of the contract and surrounding circumstances, will as well apply to a piece or parcel of the farm west of the East Quarry as the point where the East Quarry is situated, and apparently as well effectuate the purpose of the grant. The description of the piece or parcel of land sought to be carved out of the lessor's farm, and from which a right to quarry stone was attempted to be granted, in effect, calls for a survey, beginning at some undeterminable point in the south part of the farm, and extending northerly to the north line of the farm, eighty rods from the lake. The place of beginning is not on the southwest part of the farm, but eighty rods easterly of that part of the farm, nor is the place of ending at the lake, but eighty rods east of that point, and at the end of the line extending northerly from the place of commencement to the north line of the farm. The phrase "southwest part of my farm," neither from its terms, nor when read in connection with the location and boundaries of the farm and the surrounding circumstances, fixes any point as being intended by these words. The southwest part of the farm may properly be described as an area of land extending half way from the southwest corner of the farm to its north line and easterly from the west line more than eighty rods, every foot of which may be said to be in the southwest part of the farm. This area is a part of the farm, but not a point on the farm. It includes within it many points, but no one can tell from the lease, the situation of the parties, the purpose of the grant and the surrounding circumstances, what one point was in-

tended to be the point from which to measure eighty rods to find the place of beginning,—whether on the east, south, west, or within the area. It is found that, by commencing at a point eighty rods easterly of the southwest corner of the farm, or at a point eighty rods easterly of any point northerly, and within forty-five and one-half rods of the southwest corner of the farm, and running northerly to a point on the north line of the farm, eighty rods from the lake shore, would include the East Quarry. It is also found that each and every point of the west line of the East Quarry, as worked, is more than eighty rods from every point of that part or section of the lake shore, at low water mark, lying west of the East Quarry; and that the most westerly point of the farm is more than eighty rods from any point in the west line of the East Quarry, as worked.

The orator contends that the words “southwest part of my farm,” should be read “southwest *point* of my farm”; but this cannot be done. There is a southwest part of the farm, consisting of a large area, corresponding with the language of the lease. When monuments exist corresponding with the sense of the terms used in the description of land, they ordinarily govern; and they cannot be omitted, and words of an entirely different meaning substituted. The parties have chosen the words found in the lease, which designate a large area of land as a monument from which to measure to find the point of commencement of the survey; and we cannot change this area to a single point or corner, when, as we have seen, the obvious purpose of the grant would be as well served by commencing at a point eighty rods easterly of any other part of the southwest part of the farm. A point of commencement eighty rods easterly of some places on the southwest part of the farm is east of the East Quarry, and from

other places is west of the East Quarry; and westerly of the last named point there are pieces or parcels of land from which stone can be obtained, of as good quality and as feasible to obtain and quarry as those in the East Quarry. Therefore, an inquiry as to the purpose of the grant does not show that the parties intended the words "southwest part" to be read "southwest point," nor does it disclose the intention of the parties respecting the point on the southwest part of the farm from which to measure to find the point of commencement, or aid us in locating the piece or parcel of land from which the lessor intended to grant a right to quarry stone, and from which the lessee understood he was acquiring such right. If we could assume that the place of beginning is eighty rods easterly of the southwest corner of the farm, then the location and extent of the piece or parcel of land mentioned in the lease would still be a matter of conjecture. Then we should have but one line or boundary, and that running from the south to the north side of the farm, at a point between the east and west boundaries of the farm, with pieces or parcels of land owned by the lessor on either side of the line, from which stone can be quarried to serve the obvious purpose of the grant, with nothing to show whether the parties intended it for an east or west boundary of the piece or parcel of land named in the lease, nor to show whether the right intended to be granted was to be exercised east or west of the line. If the words employed to describe a tract of land, when read in the light of the situation of the parties, the subject-matter, and the surrounding circumstances, fail to do so in such a manner as to show what tract was intended, the deed will be void for uncertainty of description. Thus, in *Bailey v. White*, 41 N. H. 337, it is held that, when a deed in fact describes no territory whatever, it cannot properly be construed to pass the title to

any particular tract of land, but must be regarded as wholly inoperative. So, in *Shackleford v. Bailey*, 35 Ill. 387, it is held that a deed of a certain number of acres out of a known tract of land, without specifying the part of the land out of which it is to be taken, is void for uncertainty. In *Mann v. Taylor*, 4 Jones' Law, 272, 69 Am. Dec. 750, it is held that a grant cannot be located when described as beginning at a stake, and the other corners are described as points at the end of course and distance, as such description is void on account of vagueness; and in *Hill v. Mowry*, 6 Gray 551, it is held that a deed which fixes the boundaries of a tract of land on the north and west, and describes it as bounded on the east by land which bounds it only in part, and as bounded on the south by land which is separated from it by the land of another person, is void for uncertainty.

It is insisted that the orator was in possession of the East Quarry. The finding upon this point is that the lease was recorded in the town clerk's office, January 13, 1899; and that shortly after the orator took possession, opened a quarry on the west side, built a dock and blacksmith shop, erected a derrick and entered into a contract with O'Brien, McHale & Co. to take stone from the west side. There is no finding that the orator ever took possession of the East Quarry, or did any work thereon. On the contrary, it is found that no stone were taken from the East Quarry except by defendants O'Brien & Sheehan. The orator having no paper title to the East Quarry, his possession of a quarry on the west side of the farm did not, by construction, extend to the East Quarry. When one takes a deed purporting to describe a tract of land, but which, through mistake, describes nothing, and under such deed takes possession claiming the whole tract, but cultivates a part only, he will hold adversely the part cultivated, and no

more. *Jackson v. Woodruff*, 1 Cowen 276, 13 Am. Dec. 525. To warrant the application of the doctrine of constructive possession under a paper title by occupancy of a part of the premises, the writing relied on should include within its description the land not occupied. *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866; *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087; *Rice v. Chase*, 74 Vt. 362, 52 Atl. 967.

The oral testimony respecting the understanding of the parties at the time the lease was executed, from which the master finds that the parties intended the lease to cover the East Quarry, was inadmissible; and this finding cannot be considered. While deeds must, if possible, be so construed as to effectuate the intent of the parties, and in arriving at the intent expressed or implied in the language used, it is permissible to consider the situation of the parties, the subject-matter of the grant, and the circumstances connected with the transaction, and every part of the deed is to be considered with the help of such evidence, it is not permissible to aid or help out an inherently insufficient description by parol evidence of what the parties intended to include therein. *Kinney v. Hooker*, 65 Vt. 333, 36 Am. St. Rep. 864; *Pingrey v. Watkins*, 17 Vt. 379; *Abbott v. Choate*, 47 Vt. 53; *Fletcher v. Clark and Burton*, 48 Vt. 211; *Smith v. Fitzgerald*, 59 Vt. 451; *Butler v. Gale*, 27 Vt. 739; *Grand Trunk R. R. Co. v. Dyer*, 49 Vt. 74.

Decree reversed and cause remanded with mandate that the bill be dismissed.

ANDREW J. DOWNS and MATILDA L. DOWNS' ADMR. v.
ELIJAH DOWNS' EXR., ET AL.

May Term, 1903.

Present: MUNSON, STANT, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 3, 1903.

Equity—Jurisdiction—Trust—Remedy at law.

The aid of a Court of equity cannot be invoked for the recovery of money held in trust, since an action at law can be maintained therefor.

APPEAL IN CHANCERY. Heard on defendant's demurrer, at the June Term, 1902, Bennington County, *Tyler*, Chancellor. Demurrer sustained and bill dismissed. The orators appealed.

Batchelder & Bates for the orators.

The bill sets forth a trust in that Matilda L., becoming possessed of money, placed the same in the hands of her husband for care and investment. The claim is purely equitable, and it could not have been allowed by commissioners. *Sparhawk v. Buell*, 9 Vt. 74; *Herrick v. Belknap*, 27 Vt. 674; *Brown v. Sumner*, 31 Vt. 671.

Barber & Darling for the defendants.

The orator's remedy is not in this Court, since there is another tribunal before which the claim can be adjudicated. *Pomeroy Eq. Jur.* s. 178; *Currier v. Rosebrook*, 48 Vt. 34.

Such tribunal exists in the commissioners appointed by the Probate Court. *Spalding v. Warner's Est.*, 52 Vt. 29;

Purdy v. Purdy's Est., 67 Vt. 50; *Albee v. Cole*, 39 Vt. 319; *Atkins' Est. v. Atkins' Est.*, 69 Vt. 270.

Chancery will not interfere except in aid of the jurisdiction of the Probate Court. *Davis v. Eastman*, 66 Vt. 651; *Adams v. Adams' Est.*, 22 Vt. 50.

START, J. The suit is in chancery, and is for the recovery of money alleged to have been held by Elijah Downs, in trust for his wife, Matilda L. Downs, who deceased before the bringing of the bill. The fact that the money sought to be recovered was held in trust is the only ground upon which it is claimed that the Court of Chancery has jurisdiction. It has been held by this Court that money thus held may be recovered by an action at law. *Parker v. Parker*, 69 Vt. 352, 37 Atl. 712; *Lynde v. Davenport*, 57 Vt. 597; *Atkins' Est. v. Atkins' Est.*, 69 Vt. 270, 37 Atl. 746; *Spaulding v. Warner's Est.*, 52 Vt. 29; *Albee v. Cole*, 39 Vt. 319; *Davis v. Eastman*, 66 Vt. 651, 30 Atl. 1; *Adams v. Adams*, 22 Vt. 50; *Purdy v. Purdy's Est.*, 67 Vt. 50, 30 Atl. 695. It appearing from the orator's bill of complaint that the cause of action is one over which the Courts of law have jurisdiction, the demurrer was rightfully sustained and the bill dismissed.

Decree affirmed, and cause remanded.

ZALVA W. CHASE v. C. A. WATSON, ELGIN BILLS and WEBSTER CATE.

January Term, 1903.

Present: TYLER, MUNSON, STANT, STAFFORD and HASELTON, JJ.

Opinion filed August 3, 1903.

*Discretion—Amendment—Continuance—Depositions—
Evidence—Certified execution.*

The allowance of an amendment to the pleadings and the decision on a motion for a continuance therefor, are matters within the discretion of the trial Court, and will be reviewed only for an abuse of such discretion.

A deposition, taken under a citation which does not contain the name of the magistrate before whom it is to be taken, is inadmissible.

In an action for an assault, in which the defendant justifies the acts complained of as done in the removal of obstructions from a highway under directions of the selectmen, a petition for a re-survey of the highway, and the survey made thereunder, are admissible on the question of malice, though unaccompanied with evidence of the existence of a legal highway.

In removing obstructions from a highway, the selectmen may use as much force as is reasonably necessary therefor.

There being nothing to show that the evidence did not call for the instruction excepted to, error does not appear.

When no facts are found and placed upon the record from which it can be seen that a certificate ought to have been granted, it cannot be said that it was error to refuse to do so.

TRESPASS FOR ASSAULT. Plea, the general issue, with notice of special matter. Trial by jury at the March Term, 1901, Washington County, *Watson*, J., presiding. Verdict, guilty against defendants Watson and Bills, and not guilty as to defendant Cate. Judgment on verdict. Motion for certificate overruled. The plaintiff excepted.

T. J. Deavitt and Edward H. Deavitt for the plaintiff.

It was error to allow the defendants to amend their pleading by bringing on to the record two entirely new defenses. The whole scope of the defense was changed. It was the duty of the Court to grant the plaintiff's motion for continuance. 4 Enc. Pl. & Pr. 863, 902; *Garrett v. Carlton*, 65 Miss. 188; *Wiatt v. Harden*, Hempst. (U. S.) 17; *Danley v. Scandon*, 116 Ind. 8; *Sapp v. Aiken*, 68 Ia. 699; *Jennings v. Sheldon*, 53 Mich. 431; *State v. Arnold*, 50 Vt. 731.

The depositions were admissible, though the name of the magistrate was not given. *Barker v. Bennett*, 58 Vt. 476.

The petition and survey were inadmissible, without evidence showing the existence of a highway. If the selectmen had not complied with the law concerning the establishment of highways, one of them could not justify an assault by putting in evidence a town record which shows an absence of legal procedure.

It was error for the Court to charge that the selectmen had a right to forcibly remove the obstructions from the highway. The selectmen have no right to take the law into their own hands. They should proceed under V. S. 3508, 3509.

The plaintiff was entitled to a certificate against Watson and Bills. Though the granting or refusing such certificate is generally a matter of discretion, here the jury must have found that the action of these defendants was wilful and malicious, otherwise there could have been no verdict against them under the charge of the Court.

J. P. Lamson for the defendants.

The records were admissible for the purpose of showing that the defendants acted without malice.

Chapter 154 of Vermont Statutes makes it the duty of the selectmen to remove obstructions from the highway. They may use as much force as may be necessary.

It was within the discretion of the Court to allow the amendments to the pleadings and to refuse a continuance.

The depositions were inadmissible, because the citation did not state the official character of the magistrate. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

The motion for a certificate was properly denied. 54 Vt. 517.

START, J. It was within the discretion of the Court below to allow an amendment of the defendants' notice of special matters in defense, and, it not appearing that there was an abuse of that discretion, error does not appear. V. S. 1148; *Bent v. Bent*, 43 Vt. 42. For a like reason, error does not appear in the denial of the plaintiff's motion for a continuance of the cause.

The citation to appear at the taking of the depositions of Mr. and Mrs. Boardman did not contain the name of the magistrate before whom they were to be taken, as is required by V. S. 1264; and for this reason, the depositions were properly excluded. *St. Johnsbury v. Goodenough*, 44 Vt. 663.

The record of a petition for a re-survey of the road, and of a survey made by the selectmen, before the time of the alleged assault, was properly received in evidence upon the question of malice, notwithstanding the record was not accompanied by evidence showing the existence of a pent road which could be re-surveyed. The record was not received for the purpose of showing that the road was legally laid out and established, but for the purpose of showing a situation that might justify the jury in finding that the defendants acted

without malice in driving upon the land for the purpose of clearing the road of obstructions. A re-survey of a highway is authorized by V. S. 3294, only when the highway has previously been laid out and surveyed, and the survey has not been properly recorded, or the record preserved, or its terminations and boundaries cannot be determined. Therefore, the fact that a re-survey had been made, which could not have been lawfully made without first ascertaining that a highway had been previously laid out and surveyed, if known to the defendants, had a bearing upon the question of their good faith, and might rightfully affect the question of exemplary damages. The Court instructed the jury that if they found that the public had acquired by prescription the right to use the *locus in quo* as a pent road, the plaintiff would have no right to obstruct the passage of the public by putting wagons across the pent road, or otherwise; and, if he did thus obstruct the way, the selectmen of the town had a right to remove such obstructions, and, if the plaintiff undertook to prevent their removal, they would have a right to prevent his doing so, using no more force than was reasonably necessary under the circumstances. In this there was no error. It is the duty of selectmen to remove obstructions from the highway, and in doing so they may use such force as is reasonably necessary for that purpose. V. S. 3508, 3509, 3510.

The plaintiff excepted to the charge of the Court upon the subject of a settlement with one Foster. The evidence is not referred to, and there is nothing before us from which we can say that the evidence did not call for the instruction given. Therefore error does not appear.

The plaintiff's exception to the refusal of the Court to grant a close jail execution is not sustained. No facts are found and placed upon the record from which we can say, as

a matter of law, that a certificate ought to have been granted. Without such facts, we cannot say that the refusal to grant the certificate was error. *Styles v. Shanks*, 46 Vt. 612.

Judgment affirmed.

CHRISTIAN DIETRICH v. LYDIA HUTCHINSON, ET AL.

January Term, 1903.

Present: TYLER, START, WATSON and HASELTON, JJ.

Opinion filed August 3, 1903.

Allegations—Former decision in same case.

A former decision in a cause will not be changed upon the same allegations.

APPEAL IN CHANCERY. Heard on demurrer to the amended bill, at the December Term, 1901, Caledonia County, *Munson*, Chancellor. Demurrer sustained and bill dismissed. The orator appealed.

Fred C. Cleveland and E. W. Smith for the orator.

The mortgage in question was a valid lien in equity on Lydia Hutchinson's sole and separate property. *Frary v. Booth*, 37 Vt. 83; *Curtis v. Simpson*, 72 Vt. 235. An understanding between husband and wife that the latter may hold her property to her sole use may be implied. *Willard v. Dow*, 54 Vt. 188.

The amendment asserts that as part consideration for the deed to Lydia it was agreed that the mortgage should be given, and that defendant Deavitt knew all about it.

Edward H. Deavitt pro se.

The petition and amendments set forth no facts in addition to those before the Court at the former hearing of this case, and do not show how the non-joinder occurred, or what the facts are with respect to it. *Child v. Insurance Co.*, 56 Vt. 609; *Sawyer v. Cross & Son*, 66 Vt. 616; *Sherman v. Organ Co.*, 69 Vt. 356; *Hunt v. Railroad Co.*, 59 Vt. 294.

It is not alleged that any request was made on Lydia Hutchinson to remedy the defect, though she did not convey for nearly four years after the alleged agreement. Defendant Deavitt was under no obligation to execute a quit-claim deed. *Railroad Co. v. Steinfeld*, 42 Oh. St. 449; *Eastman v. Water Power Co.*, 24 Minn. 437; *Fink v. Farmers' Bank*, 56 Am. St. Rep. 746; *Kelley v. Insurance Co.*, 27 N. Y. App. 336; *Brainerd v. Van Dyke*, 71 Vt. 363.

START, J. When this case was before this Court and heard upon the report of the special master, as reported in 73 Vt. 134, 50 Atl. 810, it was held that the mortgage executed by Lydia Hutchinson and her husband, and sought to be foreclosed, was void because the name of the husband was not inserted in the body of the mortgage deed as a grantor; that this could not be validated without statutory power therefor; that the transaction could not be treated as an equitable mortgage; that the defendants did not hold the premises in trust for the petitioner; that we could not well say, from the record, whether the necessary elements to make a case for rescission of the contract existed; and thereupon the case was remanded to the Court of Chancery without directing a final decree against the petitioner, but leaving him at liberty to apply further if he should be so advised.

After the cause was remanded to the Court of Chancery, the petitioner there attempted to amend his petition; but in

doing so he brought no material fact upon the record that was not in the original petition, or the report of the master, and considered by us on the former hearing. It does not appear why the name of the husband was not inserted in the body of the mortgage as a grantor. It may have been omitted by mistake, ignorance of the draftsman, fraud of Mrs. Hutchinson, or by the mutual agreement of the parties. We are not informed of the reason for the omission. It is still a matter of conjecture. We are no better informed, nor have we any other or different facts from those before us on the former hearing, when we considered that the necessary elements for a rescission of the contract were not before us, and left the petitioner at liberty to apply further if so advised. The facts now before us being the same as those considered by us when we held that, on the petitioner's showing, he was not entitled to the relief prayed for, the holding, in this respect, must be the same as it was then. *Childs v. Millville Ins. Co.*, 56 Vt. 609; *St. Johnsbury & Lake Champlain R. R. Co. v. Hunt*, 59 Vt. 294; *Stacy v. Vermont Central R. R. Co.*, 32 Vt. 551.

Decree affirmed and cause remanded.

JESSIE L. INGRAM v. JAMES INGRAM.

January Term, 1903.

Present: TYLER, MUNSON, STAET, WATSON and STAFFORD, JJ.

Opinion filed August 5, 1903.

Petition for support—Sufficiency—Findings in former suit—Admissibility.

A petition for support, under V. S. 2701, need not allege that the wife is living apart from the husband.

On trial of such petition, a finding of facts made in former divorce proceedings brought by the husband, to the effect that the wife was not guilty of wilful desertion, is inadmissible.

PETITION FOR SUPPORT. Heard at the March Term, 1902, Washington County, *Haselton*, J., presiding. Judgment for petitioner. The defendant excepted.

John W. Gordon for the defendant.

The findings of fact were inadmissible. The issues in the divorce case and in the case at bar were not the same. *Priest v. Foster*, 69 Vt. 417; *Aiken v. Peck*, 22 Vt. 255; *Tarbell v. Tarbell*, 57 Vt. 492.

The petition is insufficient in that it does not set forth sufficient facts to show that the petitioner is entitled to the relief prayed for.

Frank J. Martin for the petitioner.

The petition alleges in the words of the statute that the petitionee fails, without just cause, to furnish suitable support for the petitioner. This is sufficient. V. S. 2701.

Whatever might have been litigated under the issue in the divorce proceedings is *res judicata*. *Kalisch v. Kalisch*, 9

Wis. 529; *Hood v. Hood*, 110 Mass. 401; *Hemenway v. Wood*, 53 Ia. 21; *Walker v. Chase*, 53 Me. 258; *Baker v. Stenchfield*, 57 Me. 563.

TYLER, J. The petition alleges that the parties were married in Scotland, in the year 1874; that the petitionee afterwards supported the petitioner in Scotland and in Barre, this State, until June, 1886, since which time, he has, without just cause, failed to support her, though he has had ample means therefor; that she has no means of her own; that in July, 1900, when the petitioner was living in Scotland, the petitionee brought a petition for divorce against her returnable to the September term, 1900, of the Washington County Court, for the cause of desertion; that it was duly served upon her; that certain orders were made in respect to temporary alimony; that the petition was heard at the March term, 1901, and dismissed. The petitioner further alleges that her husband deserted her; that she is living apart from him, and prays that he may be decreed to furnish her suitable support.

1. Under the first clause of V. S. 2701, it was only necessary to allege that the husband had failed, without just cause, to furnish suitable support for his wife. It was not necessary to allege or prove that she was living apart from him. But the petitionee contends that, as the petition alleges, under the third clause of the section, that the petitioner was living apart from him, it should have further alleged that it was for justifiable cause, and specified the cause. But we think the petition was sufficient. It was within the discretionary power of the Court below to have ordered a specification, upon motion therefor, before the trial commenced; but such motion was not made.

The degree of strictness required in common law pleadings is not necessary in proceedings under this section, or in

divorce cases. In *Blain v. Blain*, 45 Vt. 538, the Court said: "Petitions for divorce are addressed to the judicial discretion of the Court; and Courts are justified, in some form, in reaching and hearing the proof of every essential fact touching the character of such relation. The manner of pleading is measurably addressed to the discretion of the Court."

2. The petition being sufficient, it was for the trial Court to decide, upon the evidence, whether the wife was entitled to an order that her husband should support her while living apart from him.

The petitioner, before resting her case, offered a finding of facts by the trial Court in the divorce case, upon which its judgment was based, for the purpose of showing the cause of the parties living apart from each other, and under the petitioner's exception the finding and the docket entries in that case, with the other evidence offered, were admitted. Were they legal evidence?

This is the rule, as stated in *So. Pac. R. R. Co. v. U. S.*, Sup. Ct. U. S., Book 42, page 355. "The general principle announced in numerous cases is, that a right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

It was decided in *Cromwell v. Sac County*, Sup. Ct. U. S., Book 24, page 195, that, "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to

those matters in issue or points controverted, upon the determination of which the finding or verdict was based."

In *Wahle v. Wahle*, 71 Ill. 510, the husband brought his petition for divorce upon the ground that his wife had, without just cause, deserted him for two years. She answered, admitting that she had not lived with him during that time, and justified her conduct by his cruelty to her. Later, she filed her cross-bill charging cruelty and adultery, and praying for a separate maintenance. Later still, she filed an amended answer charging adultery. The petition for divorce was tried, and the petitioner was defeated. Then the wife's cross-bill was tried and dismissed. The wife insisted that the verdict in the first suit was a judicial determination of the facts alleged in her cross-bill, and justified her living apart. The question was whether the record of a judgment finding the issues against a complainant, who had sought a divorce on the ground of desertion, was conclusive evidence in favor of the defendant's right to recover maintenance. Did such a record conclusively prove that the wife was living apart from her husband without her fault? The Court said it could not be pretended that the object of the bills and the relief sought was in each case, the same; that if the issues made in the cross-bill had been submitted to the jury with the issues made in the original bill, and the verdict had been as it was, there would have been force in the wife's claim. But it was not done, and the cases had been disposed of as if they had no connection with each other.

In that case it was decided that, "to entitle a wife to a separate maintenance, she must show that she lives separate and apart from her husband without her fault. If she voluntarily abandons him, or if she is compelled to abandon him on account of her adultery or her wicked conduct, she will not be,

entitled to a separate maintenance; that a judgment or decree is not evidence upon a matter that is only collaterally drawn in question, nor to any matter incidentally cognizable, * * * ." Freeman on Judgments, § 258; *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772; *Jackson v. Wood*, 3 Wend. 27; Broom's Legal Maxims, 231.

This case shows that the fact of the adjudication in the divorce suit was in evidence in this trial without objection. The finding of facts was, in substance, that after the marriage the parties lived in Scotland till 1882, when the husband came to Barre; that the wife came in 1885, and lived with him about a year; that they did not live harmoniously, for the reason that the wife thought her husband unduly intimate with another woman; that they had unpleasant talks, and the wife spoke of leaving, and the husband said she had better leave; that on one occasion he told her he should be happier if she would take her trunk and go home, and that he would not go out with her if she remained in Barre; that these talks resulted in her returning to Scotland with her husband's consent and pecuniary assistance; that he went to Boston with her and their daughter, and helped them in getting on board the boat; that the petitioner never requested the petitionee to return and live with him; that at one time, when she sought an interview with him, when he was in Scotland, he refused to see her, and that he has never wished to have her return.

The only issue in the former case was whether the wife was guilty of wilful desertion; in this, the issues were whether the petitionee had, without just cause, failed to furnish suitable support for his wife, or had deserted her, or whether the petitioner was actually living apart from the petitionee for a justifiable cause.

It is evident that the issues in the two suits were not dependent upon the same facts, so the former judgment was not conclusive of the petitioner's right to the order prayed for here. The adjudicated fact that the petitioner did not wilfully desert her husband did not establish any allegation in her petition, nor, consequently, her right to a separate support. The issues here made must be decided upon a trial in the Court below.

The "finding of facts" in the divorce suit was immaterial, and should have been excluded.

Judgment reversed and cause remanded.

FRED C. H. FRAPPIEA v. NELSON S. JOHNSON.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 5, 1903.

Conversion by mortgagee—Measure of damages—Concession as to rule.

When damages are awarded according to the rule contended for by a party, his exception thereto will not be sustained.

TROVER. Plea, not guilty. Trial by jury, at the June Term, 1902, Orange County, Rowell, C. J., presiding. Verdict and judgment for plaintiff. The defendant excepted.

William Batchelder and Darling & Darling for the defendant.

The true measure of damages was the value of the property at the time of the taking, less the amount of the lien. *Deal v. Osborn*, 42 Minn. 102; *Cushing v. Seymour*, 30 Minn. 301; *Kimball v. Marshall*, 8 N. H. 291; *Russell v. Butterfield*, 21 Wend. 300; *Chamberlin v. Shaw*, 18 Pick. 278; *Brierly v. Kendall*, 17 A. & E. 937.

The sum found as the value of the use of the horses is not recoverable. *McLoud v. Wakefield*, 70 Vt. 558; *Longey v. Leach*, 57 Vt. 377; *Jones Chat. Mort. s. 426*; 1 *Cobbey Chat. Mort. s. 500*; *Pingrey Chat. Mort. s. 665*; 5 *Enc. Law* (2 Ed.), 985.

The defendant is not precluded from insisting upon a proper judgment by his conduct at the trial. *Holman v. Boyce*, 65 Vt. 318; *Newton v. Watkins*, 12 A. & E. 925; *Railroad Co. v. Howard*, 13 How. 307; 11 *Enc. Law* (2 Ed.), 446.

David S. Conant and R. M. Harvey for the plaintiff.

The defendant is estopped from questioning the correctness of the rule of damages adopted at his request. 3 *Cent. Dig.* 3603.

TYLER, J. Trover for two horses which the defendant sold the plaintiff for \$200, the plaintiff giving therefor two \$100 notes, signed by himself with a surety, and payable respectively six and twelve months after date; he also gave the defendant a chattel mortgage upon the horses and upon four cows, to secure the payment of the notes. The mortgage contained no agreement in respect to the possession of the property.

The defendant's agent took the horses from the plaintiff's possession and removed them to New Hampshire, and they

were sold by the defendant before this suit was brought. The plaintiff's evidence tended to show that they were taken from him and sold against his will and protest, while that of the defendant tended to show that the plaintiff consented to the taking and sale. The plaintiff had paid nothing upon the notes when the horses were taken, nor has he since paid anything thereon. The notes and security remain the same as when they were given.

It was agreed that the defendant had no right to take the horses without the plaintiff's consent, until the expiration of thirty days from the maturity of the first note, and the case was tried and submitted to the jury, so far as the right of recovery was concerned, upon the question whether or not such consent was given.

At the close of the evidence, upon inquiry by the Court, the plaintiff claimed that he was entitled to recover the value of the horses at the time of the taking, and such further damages as he had sustained by being deprived of their use. The defendant claimed the rule to be the value of the horses only, and the plaintiff's opening argument and both of the defendant's arguments were made upon these theories; but, before the plaintiff's closing argument was made, the defendant claimed to the Court that the rule of damages was the value of the property taken, less the amount of the lien, and that there could be no recovery if the lien was as much as the value of the horses. Upon discussion, the defendant finally insisted that the rule was the value of the use of the horses from the time of the taking to the expiration of thirty days after the first note fell due, and abandoned the claim that there could be no recovery if the lien was as much or more than the value of the property. The Court was not satisfied that the defendant ought to make the latter claim at that stage of the trial,

but submitted to the jury to find whether or not the defendant was guilty, and if guilty, what was the value of the horses, and what the value of the use from the taking until December 16, 1901, the time when the defendant was entitled to take the horses by the statute. To this action of the Court neither party excepted. The jury rendered a verdict of guilty, and found that the value of the horses was \$184.10, and that their use for the time stated was of the value of \$90.

1. The special verdicts were taken with the acquiescence of counsel on both sides. After verdict counsel were heard upon the question of judgment, and the defendant's counsel then contended that, upon the facts found, the judgment should be for him; he also contended that the removal by him of the horses from this State did not constitute a conversion.

2. While the Court was considering what the judgment should be, the defendant refused to surrender the notes and security, or to file them with the clerk of the Court.

3. The Court directed a judgment for the smaller sum found by the jury, to which the defendant excepted. This was the only exception taken by him in the trial. When the judgment was entered the defendant had abandoned his first ground, that the damages should be the value of the horses at the time of the taking; also his second ground, that the rule should be the value of the horses less the lien, and that therefore there could be no recovery; and the Court had submitted the case to the jury upon the defendant's third ground, that if he was found guilty the damages should be the value of the use.

Upon the verdict there could not have been a judgment for the defendant, nor a judgment against him for nominal damages. The verdict established the fact that the taking of

the horses was wrongful, and entitled the plaintiff to a judgment. The horses having been taken unlawfully, the defendant had no right to their use, and he could not offset his lien against the value of such use.

Upon the defendant's claim that the rule of damages was the value of the use of the horses, he conceded his liability for the use, provided the jury should find the taking was without the plaintiff's consent. The judgment was for the sum contended for by the defendant, if he was liable at all, and his exception thereto cannot be sustained.

Judgment affirmed.

ROBERT J. McDOWELL v. THOMAS McDOWELL'S ESTATE.

May Term, 1903.

Present: TYLER, MUNSON, STANT, STAFFORD and HASKELTON, JJ.

Opinion filed August 6, 1903.

Note—Limitations—Payment—Proof of—Application—Services—Presumption.

An indorsement on a note, in the handwriting of the payee, is evidence of such payment, though made after the statute has run.

The admission of certain items of credit on the claimant's book was not error, since the defendant was not harmed thereby.

That the debtor had money which the creditor knew of is not evidence tending to prove payment, in the absence of evidence that the creditor was in pressing need.

It was not error to refuse to charge that the payments must have been made with intent to have them applied on the note, since the creditor might make the application if the debtor did not.

Evidence tending to show that a disputed indorsement was for the value of certain property "which the plaintiff had of the defendant" is, in the circumstances, sufficient to warrant a finding that it was had by way of bargain and sale.

The inference that labor was performed upon expectation of payment is never rebutted by the mere fact of the relationship of the parties, but special conditions which bear upon their dealings are required.

APPEAL FROM COMMISSIONERS. Declaration, general assumpsit. Pleas, the general issue, payment, and statute of limitations. Trial by jury at the December Term, 1902, Caledonia County, *Watson*, J., presiding. Verdict and judgment for the claimant. The defendant excepted.

May & Simonds and *B. E. Bullard* for the defendant.

The plaintiff was bound to show that the payments were voluntary and made with the intent that they should be applied on this note. *Austin v. McClure*, 60 Vt. 453; *In re Bryant's Est.*, 73 Vt. 240; *Terrill v. Deavitt*, 73 Vt. 188.

The indorsement in the handwriting of the claimant should not be held to be evidence of such payment. V. S. 1216.

The indorsement of the cedar should be disregarded. The evidence shows that the cedar was cut without right. *Davis v. Smith*, 48 Vt. 52.

The book credits should have been excluded. *Lapham v. Kelley*, 35 Vt. 195; *Paris v. Bellows*, 52 Vt. 351; *Jones Ev.*, s. 583; *Oberg v. Brien*, 5 N. J. L. 145.

The evidence that Thomas McDowell had money in the savings bank, which the plaintiff knew about, should have been received. *Huse v. Preston*, 51 Vt. 245; *Downer v. Bowen*, 12 Vt. 452; *Kimball v. Lake*, 31 Vt. 683; *Kirkaldie v. Paige*, 17 Vt. 262; *Buzzell v. Willard*, 44 Vt. 44; *State v. Hopkins*,

50 Vt. 316; *Bedell v. Foss*, 50 Vt. 94; *Landall v. Preston*, 52 Vt. 198; *Houghton v. Clough*, 30 Vt. 312.

Dunnett & Slack for the plaintiff.

The indorsements were evidence of payment. *Bailey v. Danforth*, 53 Vt. 504; *Lawrence v. Graves' Est.*, 60 Vt. 657.

The book items were properly admitted. *Greene v. Mills' Est.*, 69 Vt. 440; *Hunter v. Kittredge's Est.*, 41 Vt. 359; *Bacon v. Vaughn*, 34 Vt. 73.

The evidence of the savings bank deposits was properly excluded. It was not shown that the claimant was in need of money. *Strong v. Slicer*, 35 Vt. 40; *Stone v. Tupper*, 58 Vt. 409; *Atwood v. Scott*, 99 Mass. 177; *Morrison v. Collins*, 127 Pa. St. 23; *Xenia Bank v. Stewart*, 114 U. S. 224.

The circumstances of this case are not such as to rebut the presumption that the services of the grandson were to be paid for. *Parker v. Parker*, 33 Ala. 459; *Markey v. Brewster*, 10 Hun, 15; *Marion v. Farnan*, 68 Hun, 383; *Bell v. Moon*, 79 Va. 341.

MUNSON, J. This was an appeal from the decision of commissioners appointed by the Probate Court for the adjustment of claims. The claim presented consisted of a promissory note bearing several indorsements in the handwriting of the payee, and certain charges upon book against which various sums had been credited. The pleas included payment and the statute of limitations.

The defendant excepted to the admission of the last two indorsements, and to the failure to charge that both payments must be established to permit a recovery on the note. The Court received and submitted these indorsements as evidence tending to show payment, but not as evidence sufficient in it-

self to establish payment; and charged that the plaintiff could recover upon a finding of the payment evidenced by the last indorsement. But if the payment indicated by the preceding indorsement was not found, the note was barred by the statute when the last indorsement was made, and the defendant contends that an indorsement made by the payee upon a note already barred is not evidence. It is said that an indorsement so made is a declaration in the payee's own interest, and that V. S. 1216 ought not to be held to authorize the use of a self-serving declaration. But this provision was passed upon in *Bailey v. Danforth*, 53 Vt. 504, and it was then considered, upon a full recognition of the distinction regarding the payee's interest, that an indorsement not written by the payor is evidence, whether made before or after the statute has run. We see no occasion to depart from this holding.

The plaintiff was a witness so far as to prove in whose handwriting his charges were. V. S. 1239. He produced his account with the deceased, and testified without objection that it was in his handwriting, and that both debit and credit items were made at the time of the transactions to which they related. The account was then received in evidence against the defendant's exception, and it is now insisted that the items of credit should have been excluded. It is not necessary to inquire how the matter is affected by the section referred to. The credits were not needed to save the charges from the statute of limitations, and the defendant cannot have been harmed by the fact that they were before the jury.

It was not error to exclude defendant's offer to show that the deceased had money on deposit to the plaintiff's knowledge. The evidence held to have been properly received in *Strong v. Slicer*, 35 Vt. 40, was evidence given by the defendant of the pecuniary condition of both the plaintiff and himself. If this

offer had included the further element that the plaintiff was in pressing need, the case referred to would have been in point. But the mere fact that the debtor has money which the creditor knows of is not evidence tending to prove payment.

The defendant was not entitled to a charge that the payments must have been made with an intent to have them applied on the note. If the money or other property was delivered by way of payment, without directing its application, the creditor could apply it upon any claim that was due, whether barred by the statute or not. 2 Am. & Eng. Ency. Law (2 Ed.) 438; and see *Early v. Flannery*, 47 Vt. 253; *Hicks' Est. v. Blanchard*, 60 Vt. 673; *Sanborn v. Cole*, 63 Vt. 590.

The evidence tended to show that the first of the disputed indorsements was for the value of some cedar cut by the plaintiff on land of the deceased. The defendant insists that there was no evidence, other than the indorsement, tending to show that the cedar was a proper subject of charge, and that it was error to leave this indorsement to the consideration of the jury. The deceased and the plaintiff were father and son, but were living in different places, with distinct properties and business interests. The case says the evidence tended to show that this was cedar "which the plaintiff had of his father in 1896." This language points to an understanding between them rather than to a trespass, and their independent relations suggest a business understanding rather than a gift. So there were circumstances in the case from which the jury might properly be permitted to infer that the transaction was one of bargain and sale.

The defendant requested an instruction that the plaintiff could not charge the deceased for services rendered by his minor son under a contract made with the son, without showing that the deceased had promised to pay him. The request

seems to have been based, notwithstanding some inconsistent language, upon a claim that the relationship between plaintiff and deceased was sufficient to rebut the ordinary inference of an expectation of payment. But this inference is never rebutted by the mere fact that the parties to the transaction are parent and child. There is nothing in the case that indicates the existence of any special condition that bore upon the dealings of the plaintiff and his father. In fact, the original arrangement regarding the plaintiff's son shows that there was none. The deceased first hired the plaintiff's son for a month by express contract with the plaintiff at a stated compensation, and the disputed charge is for a second month during which the son continued to work under an arrangement between his grandfather and himself. The question presented is simply that of a father's right to recover for the services of his minor son.

Judgment affirmed.

W. BEECHER FONDA v. ISAAC L. GIBBS, ET AL.

May Term, 1902.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD and
HASELTON, JJ.

Opinion filed August 8, 1903.

Mortgage—Resulting trust—Notice—Rights of assignee.

When a wife joins with her husband in a mortgage of land, the title to which he holds in trust for her, the mortgage is superior to the trust, though she is not described in the instrument as the wife of the other grantor, and the mortgagee takes the security know-

ing that the land covered was formerly sold as a part of the husband's insolvent estate, and that the husband's title was by warranty deed from a former mortgagee, who had foreclosed.

The assignee of a mortgage which is superior to a resulting trust is entitled to priority, though he takes the assignment with notice of such trust.

APPEAL IN CHANCERY. Heard on the report of a special master and exceptions thereto, at the March Term, 1902, Franklin County, *Tyler*, Chancellor. *Pro forma* decree for the orator. The defendants appealed.

Farrington & Post for the defendants.

The trust arose in 1893 when the assignee of J. L. Gibbs sold to Nellie W. Gibbs the real estate in question, and took her money for it. *Williams v. Wager*, 64 Vt. 326.

The orator had notice of this trust. He knew that all the property belonging to Gibbs' estate was sold; he knew that Mrs. Gibbs was not described as the wife of Mr. Gibbs; he knew when he purchased the Lepper mortgage that the girls claimed an interest in the premises.

C. W. Witters for the orator.

There is nothing in the case to show that the orator had notice, by record or otherwise, that Nellie W. Gibbs had any title to the premises.

As to the Lepper mortgage the orator can stand on the *bona fide* title of his assignor. All his mortgages are superior to the trust, if one existed. *Besson v. Eveland*, 26 N. J. Eq. 468; *Huss v. Kenney*, 43 Neb. 822; *Logan v. Eva*, 144 Pa. 312.

HASELTON, J. This was a petition to foreclose three mortgages. The petition was answered. A cross-bill was

filed and answered. The case was referred to a special master who reported, and exceptions to the master's report were filed by both the orator and the defendants. A *pro forma* decree was rendered in favor of the orator in accordance with the prayer of his bill. The defendants appealed.

From the master's report the following facts appear: The defendant Isaac L. Gibbs was a married man and the husband of Nellie W. Gibbs, at all times material to this case, down to her death April 16, 1898. The other defendants, Mary Gibbs, Fannie Gibbs, Frances Gibbs, and Georgiana Gibbs, were children and heirs at law of said Isaac L. Gibbs and Nellie W. Gibbs. The said Mary Gibbs died February 14, 1902, after the institution of these proceedings.

The premises covered by the mortgages in question are situated in the town of St. Albans, and were conveyed to the said Isaac L., by a redeemable lease, March 10, 1890. At the April Term, 1893, of the Court of Chancery for Franklin County, a decree of foreclosure against said Isaac L. on said lease was obtained. At this time the estate of said Isaac L. was being administered in insolvency, he having been adjudged an insolvent debtor February 3, 1893, and his estate having been assigned to an assignee. No record of such assignment was made in the land records of the town of St. Albans. At a meeting on said insolvency estate the Judge of the Court orally directed the assignee to sell for a price named the real estate of the insolvent, which consisted of the premises in question and of another lot of land, and in accordance with such order of the Court, the assignee, May 17, 1893, sold said real estate to Nellie W. Gibbs, wife of said Isaac L., for about \$400.00, which sum she paid out of her sole property. It was the intention of the assignee to deed to said Nellie W. all the interest of said insolvent estate in both pieces of land referred

to. He, in fact, however, executed and delivered to her a deed which omitted any reference to the premises in question. The mistake came about through the failure of said Isaac L. Gibbs to furnish the assignee with all his muniments of title to real estate that the assignee had called on him for. April 24, 1894, the decree in chancery above referred to was assigned to one H. E. Lewis. Mrs. Gibbs, out of her own money, redeemed the decree so assigned to H. E. Lewis, and May 30, 1895, before the equity of redemption had expired, said Lewis executed to said Isaac L. Gibbs a warranty deed of the premises in question. The next day one Ernest A. Lewis, a son of H. E. Lewis, acting for his father, delivered the last mentioned deed to Isaac L. Gibbs, and the same was duly recorded. There were present at the delivery of the deed Isaac L. Gibbs, his wife, Nellie W. Gibbs, and one F. J. Houghton, who was acting for and with the said Nellie W. Gibbs. An objection to the deed was for a time made on account of its running to Isaac L. Gibbs instead of Nellie W. Gibbs. The grantor, H. E. Lewis, was, however, out of town and was to be absent for some considerable time. Said Nellie W. took counsel with reference to the matter, and the deed was delivered and recorded as above stated. Afterwards, but when does not appear, said Nellie W. Gibbs and her daughters Mary and Fannie furnished some money which was used for the construction of buildings on the premises in question. At no time did the records show any title or color of title in said Nellie W. Gibbs.

There are no facts reported which tend to show that a resulting trust in the premises arose after the giving of any of the mortgages sought to be foreclosed. Assuming, however, that from the facts reported a resulting trust estate in the premises arose in favor of Nellie W. Gibbs before the giving of

any of the mortgages in question, still, in view of all the facts reported, the case is not affected thereby.

At some time in 1895 or 1896, the exact time not appearing, said Isaac L. Gibbs with his family moved onto the premises in question, and from that time continued to reside there.

The first of the three mortgages in question was given to one George W. Lepper, August 3, 1895, the said Isaac L. and his wife Nellie W. joining in the mortgage. This was given to secure a note for the sum of \$425.00 of even date with the mortgage and signed by the said Isaac L. Gibbs. The second of the mortgages in question was given to the orator December 14, 1895, both the said Isaac L. and his wife Nellie W. likewise joining in it. This mortgage was given to secure a note of even date therewith for \$840.00 signed by the said Isaac L. This note was in settlement of an account in favor of the orator for money and material used in the construction of buildings on the premises in question. Though the wife, Nellie W., joined in these two mortgages, she was not named in either as wife. These mortgages were clearly rendered superior to any interest of the said Nellie W., in the premises in question.

The third of these mortgages was given to the orator by the said Isaac L. Gibbs, June 17, 1898, after the death of said Nellie W., which, as hereinbefore stated, occurred April 16, 1898. Under this mortgage the orator advanced to said Isaac L. cash and material to the value of \$1,987.25, which was used in the construction of buildings on the premises in question. At the time of taking the last mentioned mortgage the orator examined the records, and found that the title to the mortgaged premises to be as already stated, and at that time the said Isaac L. Gibbs represented to the orator that he was the owner of said premises, and that the only encumbrances thereon were the Lepper mortgage and the previous mortgage to

the orator. This mortgage the defendants claim is subordinate to the interest which the defendants, Mary, Fannie, Frances and Georgiana, acquired in the premises upon the death of their mother. For it is claimed that in the taking of this mortgage the orator was affected with notice of the resulting trust. The principal ground of this claim is that in the Lepper mortgage and the first mortgage given to the orator, the wife of Isaac L. had joined without being designated as wife. But there was nothing about this fact which put the orator upon any inquiry which he did not make. Another ground of this claim is the finding by the master that, during the insolvency proceedings in 1893, the orator knew that all of the property belonging to the estate in insolvency of said Gibbs was sold at the time. It is argued, in effect, that this put the orator upon inquiry as to the person to whom the interest of Gibbs, in the premises in question, was sold, and that this inquiry followed up with due diligence would have brought to his knowledge the fact that the premises were sold, though not deeded, to Mrs. Gibbs. But this cannot be said. It is further argued, in substance, that the warranty deed from H. E. Lewis to Isaac L. Gibbs put the orator upon inquiries which should have revealed the trust estate in Mrs. Gibbs. But this argument is untenable. The express finding of the master is that the orator did not know of any claim to a trust estate in the premises until sometime in 1901, when the defendant, Isaac L. Gibbs, was in bankruptcy. When, therefore, the orator took his second mortgage in 1898, he did not have record notice or actual notice of the trust estate, and the facts relied upon by the defendants ought not to be given such force as to charge him in law with implied notice.

The defendants claim, in their brief, that the resulting trust arose in 1893, when the assignee of the estate in insol-

vency of Isaac L. Gibbs sold to Nellie W. Gibbs the real estate in question, and took her money therefor. It is to be noted that the fact that the money then paid for said real estate was the money of Nellie W. Gibbs is found by the master upon the testimony of Isaac L. Gibbs; and that, as above stated, when the mortgage of 1898 was given to the orator, the same Isaac L. Gibbs represented to the orator that he, Gibbs, was the owner of the premises covered by the mortgage, and that they were not encumbered otherwise than by the Lepper mortgage and the previous mortgage to the orator.

After learning of the claim made to a trust estate in the premises, the orator purchased the Lepper mortgage, hereinbefore referred to, and these foreclosure proceedings were brought. The defendants in their cross-bill do not question that this mortgage, in the hands of the orator, is superior to the resulting trust set up by the defendants, this mortgage, as before stated, having been joined in by the said Nellie W. Gibbs. The cross-bill prays that the trust may be decreed to be a good and valid lien upon the real estate in question having precedence over all mortgages or liens subsequent to the date of the last mortgage executed and signed by the said Nellie W. Gibbs, and that they may have a reasonable time in which to redeem the mortgages executed by the said Nellie W.,—that is, the Lepper mortgage and the first mortgage given directly to the orator. In argument, however, the defendants claim that the orator cannot foreclose the Lepper mortgage, because he purchased it after notice of the trust estate. This argument, however, is not sound, as we have seen that Mrs. Gibbs had encumbered her trust estate by joining in the Lepper mortgage; and in purchasing the Lepper mortgage the orator acquired a security which the act of Mrs. Gibbs had made superior to the resulting trust. As assignee of the Lep-

per mortgage the orator is entitled to the priority to which the original mortgagee was entitled.

The result is that the decree of the Court of Chancery is affirmed, and the cause remanded.

JOHN Q. HASKELL'S ADMR. v. J. H. HOLT, CLARA E. HOLT
and W. C. DANIELS.

May Term, 1903.

Present: TYLER, MUNSON, START, STAFFORD and HASKELTON, JJ.

Opinion filed August 12, 1903.

*Junior mortgage—Foreclosure—Effect—Witness—
Competency.*

The priority of a superior mortgage is not affected by an ordinary decree of foreclosure in a suit against the holder in favor of a junior mortgagee.

In a petition for foreclosure brought by an administrator, the defendant is not a competent witness to prove the declarations of the decedent.

The widow of the decedent was a competent witness, it not appearing that she testified to confidential matters.

APPEAL IN CHANCERY. Heard on the report of a special master and defendant Daniels' exceptions thereto, at the September Term, 1902, Washington County, *Watson*, Chancellor. Decree for the petitioner. Defendant Daniels appealed.

T. J. Deavitt and *J. G. Wing* for the defendant.

The former decree is conclusive. If Haskell lost his day in Court it was through his own fault, and equity will not relieve him. *Hyde v. Hyde*, 50 Vt. 301; *Durkee v. Durkee*, 59 Vt. 70; *Kopper v. Dyer*, 59 Vt. 477.

A judgment is conclusive not only as to all questions decided, but as to all questions that might have been decided. *Stratton v. Lyons*, 53 Vt. 130, 641; *Paine v. Slocum*, 56 Vt. 504.

Daniels could testify to the matters offered since they referred to a contract originally made with a person who is living and competent to testify.

Mrs. Haskell must have obtained the facts given in her testimony from her husband, and was therefore incompetent. V. S. 1240.

J. P. Lamson for the petitioner.

The original foreclosure lapsed. And if not, the decree therein does not affect the rights of the prior mortgagee.

Daniels was not a competent witness. V. S. 1238, 1239.

It does not appear that the widow testified to confidential matters, so she was competent.

START, J. The petition is for the foreclosure of a mortgage, executed by defendant Holt and his wife to the petitioner's intestate, John Q. Haskell. Defendant Daniels, as holder of a subsequent mortgage upon the same premises, brought a petition to foreclose his mortgage, returnable at the September Term, 1897, of the Court of Chancery in and for the County of Washington, making Holt and Haskell defendants thereto, charging, among other things not material upon the issue in this cause, that Haskell claimed some right or interest in the premises thereby sought to be foreclosed, by virtue of a mort-

gage given prior to defendant Daniel's mortgage, then in suit, and upon information and belief charging that Haskell's mortgage had been paid, but, if not paid, praying that the amount due thereon be ascertained and he be allowed to redeem. In that suit no appearance was entered by either of the defendants, and the usual decree of foreclosure was entered upon the docket, bill taken as confessed and decree for petitioner, with one year's redemption. The attention of the Court was not directed to the fact that the petitioner asked to redeem a prior mortgage, and no special order was made with reference to ascertaining the sum due upon the prior mortgage indebtedness. Daniels procured a master's report of the indebtedness of Holt to him, according to the usual practice, but no proceedings were had to ascertain whether there was anything due to Haskell upon his prior mortgage. No decree having been drawn up and signed by the Chancellor at the March Term, 1899, upon a stipulation signed by defendant Holt, without notice to or knowledge on the part of Haskell, the case was brought forward upon the docket of the Court, and a decree entered according to the stipulation. The decree that was then drawn up and signed by the Chancellor recites that, at the March Term, 1899, the cause was brought forward upon the docket, and a decree rendered for the orator, by agreement of the parties, upon said note and mortgage, as by said report and agreement on file appears. It appears from the agreement thus referred to in the decree, that Haskell was not a party to it. It thus appearing that he was not a party to the agreement under which the former petition was brought forward upon the docket of the Court at its March Term, 1899, and a decree entered according to a stipulation signed by Holt only, the petitioner's rights cannot be determined by that decree, but must be determined under the decree of the September Term,

1897, which was an ordinary decree of foreclosure. The decree thus entered being an ordinary decree of foreclosure, it had the effect only to bar the defendant's equity of redemption in the premises; but this did not affect Haskell. His right in the premises was not an equity of redemption. He was, at the time the decree was entered, the owner of the premises, subject only to the right of Holt and Daniels to redeem the premises by paying the debt secured by his mortgage; therefore, the decree, which only barred the equity of redemption, did not affect his prior right in the premises. *Carpenter v. Millard*, 38 Vt. 9; *Shaw v. Chamberlin*, 45 Vt. 512; *Kinsley v. Scott*, 58 Vt. 470, 5 Atl. 390.

In *Buzzell v. Still*, 63 Vt. 490, 22 Atl. 619, 25 Am. St. Rep. 777, the petitioner, while holding a deed which though absolute in form was a mortgage in fact upon the premises, was made a defendant to a petition brought to foreclose a subsequent mortgage given by the equitable owner upon the same premises, wherein it was charged that he claimed title to the premises by deed or otherwise. He made no answer, the petition was taken as confessed, the ordinary decree of foreclosure passed against all the defendants, none of them redeemed and the decree became absolute; and it was held, that the clause in such decree, that the defendant and all persons claiming under him "shall be foreclosed and forever barred from all equity of redemption in the premises" relates only to such rights and interests as are inferior to the mortgage that is foreclosed, and not to such as are superior; that the effect of the former decree of foreclosure was to cut off the equity of redemption as to the defendant's inferior rights in the premises, and thereby to convert the conditional title conveyed by the mortgage into an absolute title; but that in all other respects the rights under the mortgage thus made absolute were left

to be determined by the deed itself. In view of this holding, further discussion of the effect of the prior decree upon the rights of Haskell under his mortgage is unnecessary.

In so far as appears from the record, there was no error in the rulings of the master upon questions of evidence. Mr. Haskell being dead, and the suit in the name of his administrator, defendant Daniels was not a competent witness to prove Haskell's declarations. V. S. 1238. The declarations of defendant Holt were hearsay evidence, and not admissible in favor of defendant Daniels. Mr. Haskell being dead, Mrs. Haskell was a competent witness, and it not appearing that she testified to any declarations made to her by her husband in confidence, or otherwise, error does not appear. *Re Buckman's Will*, 64 Vt. 313, 33 Am. St. Rep. 930.

Decree affirmed and cause remanded.

CALEB CLARK v. JOHN CLEMENT.

May Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD AND HASELTON, JJ.

Opinion filed August 12, 1903.

*Contract—Construction—Conditional sale—Conversion by
vendor—Measure of damages.*

A written contract which stipulates that certain labor is to be paid for in personal property which is to be the property of the payor until paid for, and on which the parties have made certain indorsements, is construed to be a conditional sale of such personal property.

For a conversion by the vendor of personal property sold conditionally, the vendee is entitled to recover the value of the property at the time of the taking, less the sum then unpaid on the contract of sale.

TROVER. Plea, the general issue. Heard on the report of a referee, at the June Term, 1902, Bennington County, Tyler, J. presiding. *Pro forma* judgment for the defendant. The plaintiff excepted.

Charles S. Chase for the plaintiff.

The contract in question evidences a conditional sale, and the defendant could not take possession of the property except as provided by statute. V. S. 2293; *Smith v. Wood* 63 Vt. 534; *Roberts v. Hunt*, 61 Vt. 612.

The plaintiff should recover the value of the property and the value of the use of the same as shown by the report.

Arthur P. Carpenter for the defendant.

The contract is an entire one, and must be completed by the plaintiff before he can claim the property. 6 Ency. Law. (2 Ed.) 453; *Implement Co. v. Parlin & Orendorf Co.*, 51 Kan. 544; *Herring v. Hoppock*, 15 N. Y. 409; *Rosendorf v. Baker*, 8 Ore. 240.

If the contract is a conditional sale, the measure of damages is the value of the property less the sum due. *Cushing v. Seymour, Sabin & Co.*, 30 Minn. 310; *Jones v. Horn*, 51 Ark. 19; *Deal v. Osborne*, 42 Minn. 102; *Brink v. Freoff*, 40 Mich. 610; *Kimball v. Marshall*, 8 N. H. 291.

START, J. The right of action depends upon the construction to be given to the following agreement, which was executed by the parties named therein: "This agreement made this

19th day of October, 1900, between Caleb J. Clark of the one part and John Clement of the other part, witnesseth, That the said Caleb J. Clark for the consideration hereafter mentioned, promises and agrees to cut and deliver logs at the said John Clement's mill from lot north of said mill at \$2.50 per M. or from other lots as agreed upon hereafter. In consideration whereof the said John Clement hereby agrees to pay to said Caleb J. Clark for labor heretofore mentioned, one pair of horses, one bay mare twelve years old and one black horse, and one pair of harnesses, valued at \$165.00, and said property to be the property of the said John Clement until paid for, and to remain on the above mentioned job until paid for."

It is found that before the execution of this contract, the defendant made an agreement with the plaintiff, under which the horses and harnesses passed into the possession of the plaintiff, and remained in his possession, and were used by him on the job mentioned in the written agreement, and on other jobs agreed upon between the plaintiff and defendant, until June 17, 1901, when they were taken by the defendant; that while the property was in the possession of the plaintiff the following endorsements were made upon the written agreement: "Received on the within agreement November 1st, \$22. Received on the month agreement March 1st \$43. June 1st received to apply on the within note \$24.36;" and that the amount of each of these indorsements was determined by the plaintiff and the defendant by settling their respective accounts at the dates of the several indorsements. The fact that the property was delivered by the defendant to the plaintiff at or before the execution of the written contract, and that while the plaintiff retained the possession of the property he made payments upon the contract, which were received by the defendant and indorsed thereon, indicate that the parties inter-

preted the contract as a contract of sale, and acted upon that understanding; and we think the written contract, when read in the light of this fact, is, in legal effect, a conditional sale of the horses and harnesses. It is clear, from the language of the written contract, that the parties understood that the plaintiff was to do certain work for the defendant, and have in payment therefor the horses and harnesses. The words in the contract, "said property to be the property of the said John Clement until paid for," imply that upon payment by the plaintiff in the manner provided for by the contract, the property and ownership of the horses and harnesses were to pass from the defendant to the plaintiff. *Whitcomb v. Woodworth*, 54 Vt. 544; *Collender Co. v. Marshall*, 57 Vt. 232.

The defendant being a conditional vendor of the property, his remedy for a breach of the contract of sale was under V. S. 2293. He, having taken the property contrary to the provisions of this statute, and refusing to deliver it on demand, is liable in this action for its conversion. *Roberts v. Hunt*, 61 Vt. 612, 17 Atl. 1006; *Smith v. Wood*, 63 Vt. 534, 22 Atl. 575. The plaintiff being the conditional vendee of the property and the defendant the vendor, and payment in accordance with the terms of the sale not having been fully made at the time the property was converted by the defendant, the plaintiff can recover only the value of his interest in the property at that time. This sum is the value of the property at the time of the conversion, diminished by the sum then remaining unpaid upon the contract of sale. *Burdick v. Murray*, 3 Vt. 302, 21 Am. Dec. 588; *Willey v. Laraway*, 64 Vt. 559, 25 Atl. 436; *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243; *Maher v. Maher*, 73 Vt. 243, 50 Atl. 1063; *Vickery v. Taft*, 1 D. Ch. 241; *Buckmaster v. Mower*, 21 Vt. 211. In ascertaining the sum remaining due upon the contract of sale, the value of the

use of the property from the date of the conversion should not be deducted. When the defendant pays the value of the property as of the day of the conversion, he will become the owner thereof, and entitled to its use as of that date. *Hill v. Larro*, 53 Vt. 629.

The pro forma judgment is reversed, and judgment for the plaintiff to recover \$64.36 and his costs.

CHARLES SEVERANCE v. THOMAS ELLIOTT.

May Term, 1903.

Present: TYLER, START, WATSON and STAFFORD, JJ.

Opinion filed August 12, 1903.

*Ram—Owner's initials—V. S. 4799—Justice judgment—
Appeal.*

Marking a ram with a single initial of the owner's name is not a compliance with V. S. 4799.

When a plaintiff appears in a suit before a justice, and, refusing to proceed, directs the justice to render judgment for the defendant and asks for an appeal, the judgment so rendered is upon the merits, and the appeal is properly allowed.

DEBT under V. S. 4798, 4800. Plea, the general issue. Trial by jury at the June Term, 1902, Windham County, *Haselton, J.*, presiding, Verdict for plaintiff. Defendant's motion in arrest overruled. Judgment on verdict. The defendant excepted.

J. C. Enright and Edw. R. Buck for the defendant.

The judgment was a non-suit, because it was entered with plaintiff's consent.

The object of the statute is satisfied by marking the ram with a single letter. V. S. 2 should apply. The statute is penal and should be strictly construed. *Farnsworth v. Goodhue*, 48 Vt. 209.

Gilbert A. Davis for the plaintiff.

The purpose of the statute in requiring the animal to be marked is to identify its owner. This could not be accomplished by using a single initial.

The proceedings before the justice were in accordance with law and practice, when one party "gives judgment and appeals."

START, J. The action is debt to recover a penalty under V. S. 4800, which provides that, if a ram is found at large out of the enclosure and possession of its owner or keeper between the 1st day of August and the 1st day of December, without being marked as provided in V. S. 4799, the owner or keeper shall forfeit to the person taking and securing it five dollars. V. S. 4799 provides that the owner or keeper of a ram shall, on or before the first day of August in each year, place on its body, in durable and legible characters, the initials of his name. It appearing that the only mark on the ram in question was the letter "E," and that its owner's name was Thomas H. Elliott, the Court instructed the jury that this was not a compliance with the statute. In this there was no error. V. S. 4797 provides that rams shall not be allowed to go at large between the first day of August and the first day of December, and subjects the owner or keeper to liability for damages sustained in consequence of his ram going at large during such time; and V. S.

4798 subjects him to a penalty if his ram is found without his enclosure with sheep other than his own. In view of these provisions, it is clear that the purpose of the statute requiring the owner or keeper of a ram to place thereon the initials of his name, was to furnish means of identifying the owner or keeper of a ram found going at large and with sheep other than those of the owner or keeper of the ram; and that one initial of the name of the owner or keeper would not serve the purpose of the enactment. That part of V. S. 2, which provides that the plural number may be applied as if singular, has no application here, for, as we have seen, one of several initials representing a man's name would not serve the purpose of the enactment. We therefore hold that the initial of a man's surname is not the initials of his name, within the meaning of the statute, and it is not in compliance with its requirements.

After verdict, the defendant moved in arrest of judgment, and in support of his motion, relied upon the following facts: At the justice trial the defendant entered a plea of not guilty, and a jury was partly empaneled, when the plaintiff refused to proceed further with the trial, and directed the justice to enter judgment for the defendant to recover his costs, and asked for and was allowed an appeal. The defendant insists that, while the record shows a judgment in form upon the merits, it was in fact a non-suit. This contention is not sustained. By V. S. 1286, a justice is authorized to enter a judgment on non-suit only when the plaintiff does not appear within two hours from the time fixed in the writ for trial, or within two hours from the time fixed for trial by a continuance. When a party plaintiff seasonably appears in a Justice Court, and does not withdraw his appearance, a judgment of non-suit cannot be

entered without his consent. *Haire v. Perry*, 74 Vt. 476, 52 Atl. 1033. V. S. 1298 prohibits the taking or allowance of an appeal from a judgment rendered by non-suit. It is to be presumed that the plaintiff, in doing what he considered necessary to be done in order to remove the cause from the Justice Court to the County Court by appeal, knew of this statute, and that he did not intend, by what he said, to request the entry of a judgment from which no appeal could be taken. It may also be presumed that the defendant and the justice knew that no appeal could be taken from a judgment rendered by non-suit; and, from the fact that the justice rendered a judgment in form upon the merits of the cause, and allowed an appeal without objection on the part of the defendant, it may fairly be inferred that neither the justice nor the defendant understood that the plaintiff consented to a non-suit. It is therefore considered that the record does not show that the plaintiff consented to have judgment of non-suit rendered against him, and that the appeal was rightfully allowed.

The view we have thus taken of what was said and done at the justice trial is sustained by the reasoning and holding of this Court in *State v. Little*, 42 Vt. 430. In that case it appeared that the respondent entered a plea of guilty in the Justice Court, and claimed and was allowed an appeal. The statute then, as now, prohibited the taking or allowance of an appeal in criminal causes when the respondent pleaded guilty, but the Court held that the appeal was properly allowed. BARRETT, J., in delivering the opinion of the Court, said: "In civil causes it is every day practice for the one party or the other to 'give judgment and appeal,' as the stereotyped phrase is, without any hearing or pleadings, and yet I think it never occurred to any one that a party thus yielding to the claim of the other side, and having a judgment rendered against him to that

effect, was or could be precluded from his right of appeal. The reasons for taking such a course in a criminal prosecution, where the justice has concurrent jurisdiction with the County Court, and the right of appeal is provided for, are just as numerous and just as cogent as in civil causes; and it would seem difficult to assign a reason why there should be any difference in this respect between the two classes of cases."

Judgment affirmed.

JOSEPH BARRETTE v. HENRY CARR and JOHN CARR.

January Term, 1903.

Present: MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 31, 1903.

*Inadequacy of damages—Setting aside verdict—Discretion—
Effect of provocation—Action for personal injuries.*

The discretion of the trial Court in setting aside a verdict for inadequacy of damages is not reviewable, when its abuse does not appear.

In an action for an assault, actual damages could not be reduced by evidence of any provocation that does not amount to a legal justification.

In an action of tort for personal injuries, gross inadequacy of damages affords a sufficient reason for setting aside a verdict.

TRESPASS TO THE PERSON. Pleas, the general issue and a justification. Trial by jury at the March Term, 1902, Franklin County, Tyler, J., presiding. Verdict for the plaintiff against Henry Carr set aside. That defendant excepted.

Felix W. McGatrick and *E. A. Ayers* for the defendant.

In view of the testimony, it was competent and reasonable for the jury to find that Henry Carr was guilty only in the first conflict. This was of a trifling character, and the sum fixed by the jury was adequate.

In actions of tort, the general rule is that a new trial will not be granted for smallness of damages. *Segw. Dam.* (3 Ed.) 645.

D. G. Furman and *Henry A. Burt* for the plaintiff.

A motion to set aside a verdict is addressed to the discretion of the trial Court, and is not reviewable here. *Newton v. Brown*, 49 Vt. 16; *Averill v. Robinson*, 70 Vt. 161.

Even where a revision is provided for by statute, it will be presumed that the discretion has been rightly used, unless the contrary appears. *Edsall v. Ayers*, 15 Ind. 286; *Lloyd v. McClure*, 2 Green (Ia.) 137; *Finley v. Davis*, 7 Ia. 3.

The damages found were so grossly inadequate as to warrant the action of the Court.

STAFFORD, J. The plaintiff was occupying a building of the defendants' when the defendants, with the assistance of several others, are alleged to have assaulted and ejected him. One question was whether the defendants had extended the time of the plaintiff's occupancy, so that he was in possession rightfully, and this question the jury decided in favor of the plaintiff by a special finding; so that, if the defendants did eject the plaintiff by committing an assault upon him, they were liable in this action. The defendant Henry was present during the whole affair, but the defendant John was present during the latter part only. The evidence tended to show an assault by Henry before John came, and also after he came. The jury

were, of course, told that they should not return a verdict against both except for an assault that both were engaged in, so that, if their verdict was against both, it must be only for what occurred after John came upon the scene; but that, if they found a verdict against Henry alone, they might include damages for what he did before John came as well as after. The verdict was against Henry alone; and, being for ten dollars only, the Court, upon motion, set it aside as grossly inadequate, and in giving its reasons said that "the jury would have failed in their duty if they had not found that Henry Carr was active in throwing the plaintiff out of doors." While being expelled, the plaintiff had put out his hand against the broken glass of the door, and cut it severely, and this the Court said was an incident of the affray, for which he was entitled to recover, if the ejection was unlawful. Thus the Court, in substance and effect, decided that the damages were grossly inadequate if the jury found that Henry did eject the plaintiff, and that the verdict was grossly against the weight of evidence unless they did find so. We cannot, therefore, adopt the defendants' view that the jury may rightfully have found that Henry was guilty by reason only of what occurred before John came and before the plaintiff was ejected, for to do so would be to revise and overrule the discretion of the Court below, in which it determined in effect that such a verdict would have been grossly against the weight of evidence. That judgment is not revisable here, there being nothing to indicate abuse of discretion. *Newton v. Brown*, 49 Vt. 16; *Averill v. Robinson*, 70 Vt. 160, 40 Atl. 49.

It appeared that the plaintiff paid out at least ten dollars in care of the wound, besides the damages he unquestionably suffered in pain, inconvenience and loss of time. It is now argued that, even if Henry was guilty as to that part of the

assault, the damages were not necessarily inadequate, because it is said the jury had a right to consider the provocation, and reduce the damages below the actual on that ground. But the rule is that actual damages cannot be reduced by any evidence of provocation that does not amount to a legal justification. *Goldsmith's Admr. v. Jay*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500.

It is also argued that in actions of this class verdicts are not to be set aside on the ground that they are inadequate, although they may be on the ground that they are excessive. No reason is suggested for this distinction, and we see none. We are aware that the rule advocated by the defendants is supported by some authorities, but we think the true rule is, that where the verdict is either so great or so small as to plainly indicate that in reaching it the jury either disregarded the testimony or acted from passion or prejudice, it is the duty of the Court to set it aside. Where the damages rest in the judgment of the jury they are, of course, not to be held either excessive or inadequate, unless they are grossly so; and in that respect actions of tort for personal injury commonly differ from actions in which there is some standard of damages disclosed by the contract of the parties or by exact evidence of pecuniary loss. But in the case before us the verdict barely covered, if it did quite cover, the money actually expended in consequence of the injury, so that the other elements must have been totally ignored. The authorities upon this subject are collected and reviewed in a thorough note to *Benton v. Collins*, 47 L. R. A. 33, 39.

Judgment affirmed and cause remanded.

HARTFORD LIFE INS. CO. v. EMILY K. WEED and B. A. HUNT.

January Term, 1903.

Present: TYLER, MUNSON, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 31, 1903.

Equity—Interpleader—Remedy at law.

One who is sued and trustee on account of the same fund cannot maintain a bill to compel the two plaintiffs to interplead.

That one of the suits is pending in another State does not affect the complainant's rights.

APPEAL IN CHANCERY. Heard on demurrer to the bill, at the June Term, 1902, Lamoille County, *Stafford*, Chancellor. *Pro forma* decree for the defendants. The orator appealed.

H. Henry Powers for the orator.

The orator ought not to be compelled to follow, through the Courts of two States, the parties claiming the insurance money, when it is ready to pay the same to whomever is entitled to it. *McClennan Interpleader*, 9, 10, 17, 32, 33, 36; *Angell v. Hadden*, 15 Ves. 244; *Webster v. McDaniel*, 2 Del. Ch. 297; *Fahie v. Lindsay*, 8 Ore. 474.

The office of an interpleader suit is not to protect the party against a double liability, but against double vexation in respect to one liability. *Insurance Co. v. Tucker*, 49 Atl. 26; *Bank v. Railroad Co.*, 46 Vt. 633; *Wing v. Spalding*, 64 Vt. 83.

T. J. Deavitt and *Edward H. Deavitt* for the defendant Emily K. Weed.

This is not a case of adverse claim under different titles, for both claims are through the title of defendant Weed, hence the bill will not lie. *McClennan Interpleader*, 34, 138, *et seq*; *Desborough v. Harris*, 5 DeG. M. & G. 439; *Drake Attachment*, ss. 700, 701.

The orator has an adequate remedy at law. *Spicer v. Spicer*, 23 Vt. 678; *Jones v. Wood*, 30 Vt. 268; *Hicks v. Gleason*, 20 Vt. 139.

B. A. Hunt pro se.

The orator can disclose in the Connecticut case and proceedings will be stayed in the Vermont case to await the result.

Interpleader will not lie. *Story Eq. Jur.* 268; 51 Atl. 123.

STAFFORD, J. The case stands upon demurrer to a bill of interpleader. The complainant company insured the life of Mr. Weed, of this State, in favor of his wife. After Mr. Weed's death, Mr. Hunt sued Mrs. Weed, the beneficiary, and trusted the company in Connecticut, where its principal office is. Then Mrs. Weed sued the company in this State for the amount of the policy. Now the company asks that these two parties interplead.

As stated by the complainant in its brief, the question is, whether an insurance company which has been garnisheed in another State by a creditor of the beneficiary, and sued in this State by the beneficiary, can immediately, before either case has proceeded to judgment, bring a bill here and require the two to interplead. The question may be stated yet more simply, for the facts that the complainant is an insurance company, that the fund is the avails of a policy, and that the proceedings are in different States, are not, in our opinion, distinguishing features in favor of the complainant. If not, the single question is, whether one who is sued at law by his creditor, and

also summoned in another action as that creditor's trustee, is entitled to have his creditor and the plaintiff in the trustee process interplead in equity. The rule is that a bill of interpleader will not be entertained when the complainant has a clear, adequate and unembarrassed remedy at law. 11 Enc. Pl. & Pr., 447, and authorities there collected. It is not claimed that relief may not be obtained at law by staying execution in the Vermont case until the garnishee is discharged in the Connecticut case, nor is it questioned that all the parties to this proceeding are also parties to the Connecticut case, so as to be bound by the judgment therein. The sole ground of complaint is that the company ought not to be embarrassed by two proceedings.

Ordinarily, it is not the fact that the complainant has been actually sued by two or more, but the fact that he is liable to be, that is said to entitle him to bring a bill of this character. If this is true, the company's contention would entitle every person summoned as trustee to bring this bill. Such, we think, is not the law. The plaintiff in trustee process has no claim upon the fund save what he acquires by that process, which operates as an attachment. To say that the attachment itself creates such a lien upon the fund that the debtor may immediately bring his creditor and the plaintiff into equity, is to say that the very process provided by law for settling the rights of the parties shall furnish the ground for ousting the law Court of its jurisdiction, which would seem to be an anomalous result. *U. S. Trust Co. v. Wiley*, 41 Barb. 477; *McClennan on Interpleader*, 33, 34; *Picken v. Victoria Ry. Co.*, 44 Upper Can. Q. B. 372.

When, as in the present case, the trustee process is pending in another State, there is the additional embarrassment that the attaching creditor's claim depends upon the law of

such other State, which would need to be ascertained and administered by the Courts of this State.

The bill must be held insufficient.

Decree affirmed and cause remanded.

CHARLIE V. PRATT v. MAY E. PRATT.

January Term, 1903.

Present: TYLER, MUNSON, START, STAFFORD and HASELTON, JJ.

Opinion filed August 31, 1903.

Divorce—Causes—Desertion.

That a wife, without physical excuse and for three consecutive years, refuses to have sexual intercourse with the husband, does not entitle him to a divorce for desertion.

PETITION FOR DIVORCE. Heard at the September Term, 1902, Washington County, *Watson*, J., presiding. Petition dismissed. The petitioner excepted.

John G. Wing for the petitioner.

The divorce should have been granted. *McGrath v. McGrath*, 103 Mass. 577.

STAFFORD, J. The fact that a wife, without physical excuse and for three consecutive years, refuses to have sexual intercourse with the husband, while fulfilling all the other duties of the relation, does not entitle the husband to a divorce "for wilful desertion for three consecutive years."

Judgment affirmed.

CITY OF MONTPELIER v. CAPITAL SAVINGS BANK, C. F.

MORSE, TRUSTEE, ET AL.

January Term, 1903.

Present: TYLER, MUNSON, START, STAFFORD and HASELTON, JJ.

Opinion filed August 31, 1903.

Interpleader—Interest of complainant—Demurrer.

One who has in hand funds against which he has accepted orders, and which are claimed by the trustee in bankruptcy of the party giving the orders, has not such an interest in the funds as will prevent him from maintaining a bill of interpleader.

One cannot compel others to interplead whose relative rights depend upon a question of fact to be settled between himself and one of the parties, though he will not be affected pecuniarily by the decision of that question.

That the complainant is a necessary party to any controversy touching the amount of the fund is a valid objection to a bill of interpleader, and is well taken by demurrer.

APPEAL IN CHANCERY. Heard on demurrer to the bill, at the September Term, 1902, Washington County, *Watson*, Chancellor. Demurrer sustained and bill dismissed. The orator appealed.

Frederick P. Carleton for the orator.

The orator without fault on its part is put in a position where it cannot determine, without hazard to itself, to which of the defendants the fund belongs. *Cram v. McDonald*, 23 N. E. 991; *French v. Robrchar*d, 50 Vt. 43; *Horton v. Baptist Church*, 34 Vt. 315.

T. J. Deavitt and Edward H. Deavitt for the defendants.

The orator is under an independent liability to one of the claimants, and cannot maintain the bill. *McClennan Interpleader*, 11, 24, 154; *Crawshaw v. Thornton*, 2 Myl. & C. 1; *Lincoln v. Railroad Co.*, 24 Vt. 639; *Holmes v. Clark*, 46 Vt. 23; *Cababe Interpleader*, 22.

The orator's acceptance of the orders, though conditional, prevents its maintaining the bill. *Fletcher Eq. Pl. & Pr.*, s. 773; *Insurance Co. v. Tucker* (R. I.), 49 Atl. 26; *French v. Robrhard*, 50 Vt. 43; *Bank v. Railroad Co.*, 46 Vt. 633; *Insurance Co. v. Pingrey*, 141 Mass. 411.

STAFFORD, J. The city of Montpelier brings its bill of interpleader, and is met by demurrer. What the bill alleges is this: The city contracted with a firm in Massachusetts to build the city a school house for the price named. Before the house was completed, the firm went into bankruptcy, and neither the firm nor its trustee in bankruptcy did anything more under the contract; so the city went on and completed it as cheaply as it could, and, deducting from the contract price what it had already paid the firm and what it has since been obliged to pay to complete the work, it offers to bring into Court the balance, naming it. Before the firm abandoned the contract, it had drawn orders on the city in favor of several creditors who had furnished material, etc., towards the structure, and each of these orders the city had accepted conditionally upon its owing the firm the amount thereof after the payment of all previous orders. The holders of these orders are claiming payment, but the trustee is insisting that they were given in fraud of the bankruptcy act, wherefore the city should not pay them, but should pay the whole balance to him. The trustee and the order-holders are asked to interplead. With

them is joined another defendant, The Norwalk Lock Company, which claims to have furnished material upon the order and responsibility of the city, and has sued it at law therefor. This party holds no order, and does not look to the fund itself, but to its own contract with the city. The city does not say whether it is directly responsible to this party or not, but says that, if it is, it will add so much to the cost of completing the building, and deduct it from the balance before named, in which case the amount will be insufficient to pay the orders in full. The trustee claims that these materials of the Lock Company were bought by the firm itself before the latter filed its petition in bankruptcy.

It is well settled that to maintain a bill of interpleader, the complainant must have no interest in conflict with that of either defendant, but merely hold a fund or owe a debt or duty which he is ready to pay or discharge in favor of the rightful claimant, whichever he may be. *Wing v. Spaulding*, 64 Vt. 83, 23 Atl. 615.

It is objected, in the first place, that the complainant is not a disinterested party, in this: that by reason of accepting the various orders it is "a necessary party to determine the effect of such acceptances." But upon the facts admitted by the demurrer there is no question as to the effect of the acceptances between the complainant and the order-holders. Excluding from consideration the Lock Company's claim, of which we shall speak hereafter, the fund is sufficient to pay all the orders, and the only question is whether the complainant shall pay the amount thereof to the respective holders, or pay the fund to the trustee in bankruptcy; and that is the question which the complainant asks to have the holders and the trustee settle between themselves. Hence we think this objection is invalid.

But, in the second place, it is objected that the Lock Company's claim against the complainant being upon a liability independent of the fund, the complainant is not entitled to maintain the bill because it is not entitled, upon payment of the fund into Court, to be released from all further responsibility. The rule is thus expressed in the Enc. of Pl. & Pr., Vol. 11, p. 459: "Interpleader will not lie if the plaintiff has incurred some personal obligation to either of the defendants, independent of the title or right to possession, because such defendant would in that event have a claim against him which could not be settled in a litigation with the other defendants,"—a proposition abundantly supported by authorities. The reason urged by the demurrants, however, will not bear inspection. They say that, if an interpleader were ordered, and it should be determined that the complainant is under direct liability to the Lock Company, the latter would have no means of collecting a portion, at least, of its debt, since by depositing the fund in Court the complainant cancels all its obligations, leaving each claimant to get what he can from the fund, whereas the fund is not sufficient for the payment of all. But such is not the situation, for the Lock Company, if it got any of its claim, would get all, and the order-holders would be the losers, since they are entitled to be paid only from the balance remaining when the contract is performed. The fund which the complainant would bring into Court to be contended for between the order-holders and the trustee is uncertain in amount by reason of the uncertainty that exists in regard to the Lock Company's right to be paid; and this uncertainty consists in the doubt as to whether the complainant became liable to the Lock Company. The real question, then, is whether one can compel others to interplead when their relative rights depend upon a question of fact to be settled between

himself and one of the parties, even though he will not be affected pecuniarily by the decision of that question. Here the complainant will not be affected pecuniarily, because it is bound to pay only the ultimate balance; but whether that balance shall go all to the trustee or all to the order-holders, or part to the order-holders and part to the Lock Company, is the question. The latter branch of it—whether a part is to go to the Lock Company rather than to the order-holders—is a question which the complainant must determine for itself, for it must be supposed to know whether it engaged to pay the Lock Company, and cannot cast upon others the burden of settling that question.

It will be observed that the order-holders and the trustee both claim through the building firm, while the Lock Company does not. In other words, there is no privity between the latter and the other defendants. There is strong, if not uniform, authority for holding that some sort of privity is indispensable. See the cases cited 11 Enc. Pl. & Pr. 449. But, whether that be unqualifiedly true or not, we hold that a bill of interpleader will not lie where the complainant is beset with a claim founded upon his own alleged promise, merely because there is a third party, who, instead of the complainant, must ultimately be the pecuniary loser if the claim is established, for the former has a right to litigate the question with the party who became bound to him, and need not concern himself with the question of right between the complainant and such third party. *Holmes v. Clark*, 46 Vt. 22; *French v. Robrcharde*, 50 Vt. 43; *North Pacific Lumber Co. v. Lang*, 28 Oregon 246, 52 Am. St. Rep. 780, at 787 and 788.

There is a third objection which, perhaps, should be considered in view of the situation of the parties and the course to be taken hereafter in this case. It is said that the complainant

is not a disinterested party, in this: that it is interested to prove that the building could not have been completed for less than it expended in completing it; in other words, that it is a necessary party to any controversy touching the amount of the fund that should be brought into Court. We think this objection also is valid, and that it is well taken by demurrer, without an answer putting the amount of the fund in controversy; for it appears from the bill itself that the fund consists of an unliquidated sum, depending upon the determination of the question how much the contracting firm had earned by its partial performance of the contract. To any litigation touching that question the city is a necessary party.

Decree affirmed and cause remanded.

STATE v. LEONARD WARD.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 31, 1903.

Criminal offense—Killing deer—Knowledge—Intent.

In a prosecution for illegally killing a deer, it is no defence that the respondent was ignorant of the fact that the animal was without horns.

INFORMATION for illegally killing a deer. Plea, not guilty. Trial by jury at the December Term, 1902, Windham County, Rowell, C. J., presiding. Verdict and judgment, guilty. Sentence thereon and execution ordered. The respondent excepted.

Gilbert A. Davis for the respondent.

If the respondent killed this deer supposing it had horns, he could not be convicted. 1 Hale 39; Foster 259; 4 Archl. Cr. Pl. & Pr. 55, and note; Cro. Car. 538; 4 Blk. Com. 27; 1 Bish. Crim. L., s. 301; *Myers v. State*, 1 Conn. 592.

A mistake of fact excuses. Bish. St. Cr., s. 132; *Etheridge v. Cromwell*, 8 Wend. 629; *Stern v. State*, 53 Ga. 229; *Kramer v. State*, 106 Ind. 192; *Marshall v. State*, 49 Ala., 21; *Cutler v. State*, 36 N. J. L. 125.

Herbert H. Blanchard, State's Attorney, for the State.

The offense is purely statutory, and ignorance of fact will not excuse its violation. *State v. Hopkins*, 56 Vt. 250; *State v. White*, 64 Vt. 372; *State v. Tomasi*, 67 Vt. 312; *Halstead v. State*, 12 Vroom 552; *People v. Roby*, 52 Mich. 577; *Com. v. Connelly*, 163 Mass. 538.

STAFFORD, J. The respondent shot and killed a deer without horns, which was a thing forbidden by statute; and the question is whether the Court erred in telling the jury that, if the respondent intended to kill the very creature he did kill, it was no defense that he supposed it to be a deer with horns, which it would have been lawful for him to kill. The act was unlawful only because the statute made it so—*malum prohibitum*. The statute itself says nothing about knowledge. Was it necessary for the State to prove that the respondent knew that the deer was without horns? If not, it was no defense that the respondent was ignorant of the fact. Upon the question whether absence of intent is material in a prosecution for violating statutory regulations the authorities are said to be irreconcilably in conflict; but, however that may be, we are

disposed to adhere to the rule already laid down in *State v. Tomasi*, 67 Vt. 312, 31 Atl. 780: "If, to constitute an offense, knowledge of certain facts is essential, it must invariably be shown that the respondent has such knowledge; but if a statute makes an act penal without reference to knowledge, it is then unnecessary to show it, and ignorance of the fact is no defense.

* * * * If a statute commands that an act be done or omitted which, in the absence of the statute, would be blameless, ignorance of the fact or state of things contemplated by the statute will not excuse its violation." In that case the statute forbade the sale of lager beer; and it was held that one who sold it could not defend upon the ground that he did not know that it was lager. It was enough that he intended to sell what he did sell. That case can hardly be distinguished from the present. In each the respondent had it in his power to find out what the fact was, or to refrain from acting until he had found out. The only distinction suggested is that a hunter must act with such celerity that he cannot take time to ascertain the fact without losing the game. But is not that an argument for the Legislature rather than for the Court? It may be pertinent to remark that if, as respondent's counsel contends, it is practically impossible for the hunter to tell whether the deer he is about to shoot has horns, then it would be practically impossible for the State to prove beyond a reasonable doubt that the respondent knew the deer to be one without horns; and that such a construction would nullify the statute.

Judgment affirmed, and that the respondent take nothing by his exceptions.

HARVEY HERSEY v. NORTHERN ASSURANCE CO.

May Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD and HASELTON, JJ.

Opinion filed August 31, 1903.

Insurance Policy—Declaration on—General count—Sufficiency—Burden of proof—Legislative power—Inconsistency in pleading—Demurrer.

At common law, a general count in assumpsit which discloses an express promise as the indispensable basis of recovery, is demurrable. Under No. 121, Acts of 1896, a count on a fire insurance policy, which alleges that the defendant, being indebted to the plaintiff in a sum named, by reason of having become an insurer of his property against loss by fire and the subsequent loss of the property by fire without the plaintiff's fault, promised to pay such sum, is sufficient.

This act only provides a simpler mode of declaring, and does not affect the substantive rights of the parties, or change the rule as to the burden of proof.

This act, thus construed, is not unconstitutional.

It is not necessary that the declaration should show that the specification required by the act has been filed.

An objection that a count is bad for inconsistency in matters of substance is well taken by general demurrer.

ASSUMPSIT on a fire insurance policy. Heard on demurrer to the declaration, at the March Term, 1903, Washington County, *Stafford, J.*, presiding. Demurrer overruled *pro forma*. The defendant excepted.

John W. Gordon and *F. A. Howland* for the defendant.

The first count does not show a consideration. *Gray v. Osborne*, 24 Tex. 157; *Harding v. Cragie*, 8 Vt. 501; *Perry Com. L. Pl.*, 88, 89; *Cowan v. Insurance Co.*, 78 Cal. 181.

The second count is equally defective in this particular. *Marshall v. Aiken*, 25 Vt. 328; *Bank v. Adams*, 43 Vt. 195.

The third count is not good as a general count, for it states that there was a special contract, which must be counted upon. It does not set out the special contract with sufficient particularity to be good as a special count. *Dickerman v. Insurance Co.*, 67 Vt. 99; *Insurance Co. v. Burris*, 23 Ind. App. 507; *Insurance Co. v. Everett*, 26 S. W. 125; *Howard v. Insurance Co.*, 3 Denio 301; *Bevin v. Insurance Co.*, 23 Conn. 244.

For the same reason, and for the reason that it states a contingent promise, the fourth count is bad. *Myers v. Phillips*, 72 Ill. 460.

The fifth count fails to allege that the plaintiff had an insurable interest in the property. *Dickerman v. Insurance Co.*, 67 Vt. 99, and authorities above cited.

The sixth count is bad for the reasons above specified.

Under No. 121, Acts of 1896, a declaration should show that the required specification has been filed.

The act is unconstitutional. *Dupy v. Wickwire*, 1 D. Chip. 237; *Burts v. Kimball*, 2 D. Chip. 77; *Staniford v. Barry*, 1 Aik. 314.

It denies certain citizens an equal protection of the laws. 16 Ency. Law (2 Ed.) 878; *Hoadley v. Purifoy*, 107 Ala. 276; *Barnes v. People*, 168 Ill. 425; *Life Asso. v. Mettler*, 185 U. S. 308.

Richard A. Hoar, F. P. Carleton and F. L. Laird for the plaintiff.

The counts are sufficient as general counts in assumpsit under No. 121, Acts of 1896. *Wertheim v. Fidelity & Casualty Co.*, 72 Vt. 326.

The Legislature had power to pass this act. *State v. Camley*, 67 Vt. 322.

STAFFORD, J. The plaintiff is seeking to recover upon a fire insurance policy; and the case stands upon a demurrer to each of the six counts of his declaration. The first and second are intended as general counts in assumpsit; neither is claimed to be good as a special count. We think it clear that at common law neither would be good as a general count, because it discloses an express promise as the indispensable basis of recovery. The allegations of fact, aside from the promise, are not such that the law raises therefrom an implied promise. Although the existence of an express promise in a special contract does not prevent a recovery upon a promise implied by law, when the contract has been fully performed on the part of the plaintiff, and nothing remains to be done on the part of the defendant except to pay money, it is always necessary that what has been done on the part of the plaintiff should be sufficient of itself to raise an implied promise. In the present case the facts aside from the promise, viz: the plaintiff's ownership of the property, its destruction by fire without his fault,—even the payment of premiums,—do not raise an implied promise by the defendant to pay; it is only the fact that it promised, upon certain conditions, to pay, that makes it liable. Consequently, at common law, the promise, the conditions, and the fulfilment of the conditions, must be set forth—in other words the count must be special. See the notes to *Cutter v. Powell*, 2 Smith's Lead. Cas. 8, and the admirable account of the action of assumpsit in Perry's Common-Law Pleading, 82-89.

It is claimed, however, that these two counts are good by virtue of No. 121 of the Acts of 1896, which declares that in

actions upon fire, life, and accident insurance policies the general counts in *assumpsit* shall be a sufficient declaration, and requires the plaintiff to file with the writ a specification of the number of the policy, the date of the fire, death or accident, and the items of the policy involved in the claim, and provides that the plea of *non assumpsit* shall put in issue only the execution of the policy, and the amount of damages sustained thereunder.

In *Wertheim v. Fidelity and Casualty Co.*, 72 Vt. 326. 47 Atl. 1071, it was held that under this act the usual omnibus counts were not sufficient, and the statute was construed as requiring a general count aptly framed for the recovery of money due upon a policy of insurance. The two counts we are now considering appear to fulfill this requirement. Each alleges, in substance, that the defendant, being indebted to the plaintiff in the sum of two thousand dollars by reason of its having become an insurer of his property against loss by fire and the subsequent loss thereof by fire without his fault, promised to pay said sum on demand, yet, though requested, neglects and refuses so to do. To say that the count must go further and set forth the terms and conditions of the contract whereby the defendant became insurer, would be to say that the count must be special.

It is objected that in this act the Legislature has exceeded its authority. ✓

[In the first place, it is said that by limiting the scope of the plea of *non assumpsit* it has required the defendant to allege, and consequently, it is assumed, to prove, matters as to which the burden must always rightfully remain upon the plaintiff,—such as the performance of conditions precedent, the plaintiff's interest at the time of the fire, etc. But does it follow that, because the defendant must specially put in issue

such matters, the burden of proof is therefore shifted? We do not construe the act as changing at all the substantive rights of the parties, but only as providing for a simpler mode of declaring. The Legislature, taking notice of the well known fact that insurers keep a record of their policies, provided for a specification by number alone, which would serve to notify the defendant of the contract under which he was sued, and for a general declaration, which, with the specification, would inform the defendant that the plaintiff claimed to have fulfilled the provisions of the contract on his part, and that a loss had occurred under the specified items on such a day. If there was no such contract, the plaintiff would fail when met by the general issue. If the defendant desired to put in issue any other matters, he was to point them out by his pleadings. It would still be for the plaintiff to prove any matter so pointed out which he would have been required to prove under a special declaration. The act, when thus construed, is like County Court Rule No. 13, which requires the defendant in an action upon a written instrument purporting to be signed by him, to file a notice with the general issue if he disputes its execution, and an additional notice if he denies the handwriting; yet the burden remains upon the plaintiff.

It is further claimed that the act is unconstitutional as denying to certain citizens the equal protection of the laws; but, as we hold that the act does not alter the substantive rights of the parties, we need not pause at this objection, for it can hardly be urged that a defendant is entitled to have a particular method of pleading kept in force in relation to one class of contracts merely because it is left in force in other classes of a similar character.

It is also objected that the counts are insufficient in failing to state that the specification required by the act has been

filed; but we think otherwise, for the specification itself is a part of the record, and in the eye of the Court.]

We hold, therefore, that the first and second counts are sufficient. ✓

The remaining four counts must be held bad for inconsistency, under the principle formulated by Stephen as the first of "Rules which tend to prevent obscurity and confusion in pleading," viz., that "Pleadings must not be insensible nor repugnant." Each of these counts is both. It first alleges that the defendant was already indebted to the plaintiff in such a sum upon the policy of insurance by reason of the loss having occurred, etc., and then alleges that in consideration thereof, and of certain other things, it undertook to pay that sum if the loss should occur, and that such loss has since occurred. The inconsistency is patent, and, being a matter of substance, is reached by the general demurrer. Gould on Pleading, chap. III, sec. 173; *Wright v. Card*, 19 Atl. (R. I.) 709; see, also, *King v. Stevens*, 5 East, 254; *Greaves v. Neal*, 57 Fed. 816.

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Gross inadequacy of damages is sufficient ground for setting aside verdict. *Barrette v. Carr et al.*, 425.

Setting aside verdict for inadequacy of damages is within the discretion of trial Court. *Ibid*.

In an action for assault, actual damages cannot be reduced by evidence of any provocation that does not amount to legal justification. *Ibid*.

DECISION.

Former decision in a cause will not be changed on same allegations. *Dietrich v. Hutchinson et al.*, 389.

DECLARATION.

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DEDICATION.

Evidence admissible on question of dedication of highway. *Clarendon v. Rutland R. R. Co.*, 6.

Evidence sufficient to show dedication of land to cemetery. *Hunt et al. v. Tolles et al.*, 48.

DEED.

See LEASE. TRUSTS.

Deed invalid for indefinite grantee. *Hunt et al. v. Tolles et al.*, 48.

Such deed, though invalid, will determine scope of dedication. *Ibid.*

Under such deed, particular owners cannot deface their lots. *Ibid.*

Effect of insolvent's deed. *Sowles et al. v. Lewis et al.*, 59.

Deed construed to create easement in fee. *Deavitt v. Washington County*, 156.

Habendum may be called in to aid construction. *Ibid.*

DEER.

That respondent was ignorant of the fact that the animal was without horns is no defense to a prosecution for illegally killing a deer. *State v. Ward*, 438.

DEFENSE.

Defense which requires special plea cannot be relied upon though it appears from the evidence. *Poole v. Mass. Mutual Accident Asso.*, 85.

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Taken under defective citation, not admissible. *Chase v. Watson et al.*, 385.

DESCRIPTION.

Sufficiency of description of debt secured by chattel mortgage. *Thompson v. Fairbanks*, 361.

Sufficiency of description of land conveyed. *Goodsell v. Rutland-Canadian R. R. Co.*, 375.

Inherently defective description cannot be aided by parol. *Ibid.*

DESERTION.

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DISCRETION.

Motion to recommit report is addressed to. *Sowles et al. v. Lewis et al.*, 59.

Court may allow in cross-examination evidence that witness has been convicted of crime not involving moral turpitude. *McGovern v. Hays & Smith*, 104.

Compliance with jury's request to have evidence read is matter of. *State v. Manning*, 185.

Motion to set aside verdict is addressed to. *Jangraw v. Mee*, 211.

Not error to refuse to order State's Attorney to produce letters in his possession. *State v. Donovan*, 308.

Time when written evidence may be exhibited to jury is within. *Ibid.*

Not error to refuse continuance on amendment of indictment. *Ibid.*

Allowance of amendment of pleadings and decision on motion for continuance therefor are matters of. *Chase v. Watson et al.*, 385.

Action of the Court in such cases will be reviewed only for abuse of discretion. *Ibid.*

Setting aside verdict for inadequacy of damages is within the discretion of trial Court. *Barrette v. Carr et al.*, 425.

This discretion is reviewable only when its abuse appears. *Ibid.*

DIVORCE.

Refusal of sexual intercourse does not amount to desertion. *Pratt v. Pratt*, 432.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW.

EASEMENTS.

Easement inures to benefit of heirs and assigns when intent appears. *Deavitt v. Washington County*, 156.

Easement may be taken by eminent domain. *Ibid.*

Easement in fee is taken with the land. *Ibid.*

Such an easement is not extinguished by unauthorized use. *Ibid.*

EMINENT DOMAIN.

Easement in fee taken by. *Deavitt v. Washington County*, 156.

Right to invoke the power of provided in V. S. c. 159. *Avery v. Vt. Electric Co. et al.*, 235.

EQUITY.

See INTERPLEADER.

Insolvent's remedy against assignee for purchase of property of estate is, in the absence of fraud therein, in equity. *Sowles et al. v. Lewis et al.*, 59.

When equity raises a lien. *Green et al. v. McDonald et al.*, 93.

Creditor subrogated in equity. *Ibid.*

Offsets available against subrogated creditor. *Ibid.*

Equity only can grant relief. *Wilder's Exrs. v. Wilder et al.*, 178.

Has jurisdiction over certain funds. *Hanks v. Hanks et al.*, 273.

Equitable lien on property of married woman. *Fletcher v. Brainerd*, 300.

Will not restrain collection of taxes on certain allegations of fraud. *Phillips v. Bancroft et al.*, 357.

Cannot be invoked to recover money held in trust. *Downs et al. v. Downs' Exr. et al.*, 383.

EQUITY OF REDEMPTION.

See ASSIGNEE IN INSOLVENCY.

ERROR.

Allowance by reference of item not on specification is not. *Sowles et al. v. Lewis et al.*, 59.

Error in receipt of evidence rendered harmless. *Nye v. Daniels*, 81.

Erroneous charge requires reversal. *Johnson v. Cate*, 100.

Not error to withdraw from jury evidence from which no material fact can be found. *In Re Hathaway's Will*, 137.

Erroneous judgment for a return of property replevied. *Widder v. Benjamin*, 152.

Does not appear when case does not show that evidence did not call for instruction excepted to. *Chase v. Watson et al.*, 385.

Cannot be predicated upon refusal to grant certified execution, unless facts are shown by the record. *Ibid.*

ESTOPPEL.

See REFEREE.

EVIDENCE.

See MARRIAGE. NEW TRIAL.

Admissible on question of dedication and adoption of highway. *Clarendon v. Rutland R. R. Co.*, 6.

Too slightly relevant to make exclusion error. *In Re Claplin's Will*, 19.
Evidence of testator's experience in execution of wills, admissible.

Ibid.

Admissible as impeachment only. *Ibid.*

Receipt signed by manager must be proved. *Nye v. Daniels*, 81.

Evidence of ownership by statement of a party rendered harmless.

Ibid.

Present professional opinions alone admissible. *McGovern v. Hays & Smith*, 104.

Certain inquiries held to be proper cross-examination. *Ibid.*

Evidence given in former trial admissible in the circumstances. *Ibid.*

Amateur photographer may testify if Court finds he is competent. *Ibid.*

Engineer allowed to testify that he did not know anything more he could have done to avert accident. *Ibid.*

Evidence does not sustain claim that town directed tax collector.

Hunt v. Eden, 119.

Evidence from which no material fact can be found may be withdrawn from jury. *In Re Hathaway's Will*, 137.

Admissible on question of genuineness of letter. *State v. Manning*, 185.

All evidence received is "real" evidence. *Ibid.*

False alibi may be considered as evidence of guilt. *Ibid.*

A party cannot except to hearsay testimony brought out by him on cross-examination. *Davis v. Streeter*, 214.

On question of wife's ownership, evidence that the property was insured in her name is admissible. *Fletcher v. Wakefield*, 257.

Admission of evidence not prejudicial is not reversible error. *Ibid.*

McDowell v. McDowell's Estate, 401.

Circumstances attending execution of mortgage, not admissible. *Davis v. Bowers Granite Co.*, 286.

Construction of written evidence for the Court. *Ibid.*

On question of alteration of a note, evidence of terms of certain other note, not admissible. *State v. Donovan*, 308.

Certain evidence not improperly excluded. *Ibid.*

Value of lumber delivered under contract, material. *Ibid.*

Usual price of article for which note was given, admissible. *Ibid.*

Inherently insufficient description in a conveyance cannot be aided by parol. *Goodsell v. Rutland-Canadian R. R. Co.*, 375.

Deposition taken under defective citation is not admissible. *Chase v. Watson et al.*, 385.

Petition for resurvey of highway and survey made thereunder, admissible on question of malice. *Ibid.*

On trial of petition for support, a finding of facts in former divorce proceedings, inadmissible. *Ingram v. Ingram*, 392.

Indorsement on note in handwriting of payee is evidence of such payment. *McDowell v. McDowell's Estate*, 401.

That debtor had money which creditor knew of is not evidence tending to prove payment, in the absence of evidence that creditor was in need. *Ibid.*

Circumstances sufficient to warrant finding that property was had under sale. *Ibid.*

Inference that labor was performed upon expectation of payment is never rebutted by the fact of relationship alone. *Ibid.*

EXCEPTIONS.

See BILL OF EXCEPTIONS. DISCRETION.

When nullified. *In Re Clafin's Will*, 19.

One cannot except to hearsay testimony brought out by him in cross-examination. *Davis v. Streeter*, 214.

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Proceedings for need not be by written petition. *Mt. Holly v. French*, 1.

FACT.

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Existence of debt a question of fact, though recited in a mortgage. *Green et al. v. McDonald et al.*, 93.

FIRE INSURANCE.

See PLEADING.

Use of certain steam engine vitiates policy. *Wilson v. Union Mutual Fire Insurance Co.*, 320.

That policy covers other engines is immaterial. *Ibid.*

Meaning of the word "use." *Ibid.*

FLOWAGE ACT.

Purpose must be a public use within the meaning of the Constitution.

Avery v. Vt. Electric Co. et al., 235.

Supplying railroad with power is not a public use. *Ibid.*

Provisions of this statute are not mere regulations of riparian rights.
Ibid.

FORECLOSURE.

Foreclosure of junior mortgage does not affect priority of a superior mortgage. *Haskell's Admr. v. Holt et al.*, 413.

FORFEITURE.

Easement in fee is not extinguished by unauthorized use. *Deavitt v. Washington County*, 156.

FORGERY.

A memorandum on the margin of a note, made at the time of its execution, is the subject of forgery. *State v. Donovan*, 308.

FRAUD.

See ASSIGNEE IN INSOLVENCY. EQUITY.

False statement is fraudulent when maker passes off belief as knowledge. *Johnson v. Cate*, 100.

GAME LAWS.

See DEER.

GRAND LIST.

Invalidated by omission of real estate from the abstract of individual lists. *Godfrey v. Bennington Water Co.*, 350.
This omission cannot be cured. *Ibid.*

GUARDIAN AND WARD.

Sufficiency of allegations to impeach final account of guardian. *Scoville v. Brock*, 243.
Final settlement of guardian's account, conclusive. *Ibid.*

HABENDUM.

See DEED.

HIGHWAYS.

See PLEADING.

Evidence admissible on question of dedication and adoption of. *Olarendon v. Rutland R. R. Co.*, 6.
Duty of railroad company to maintain overhead crossing. *Ibid.*
To sustain action against a town for an injury on the highway, the plaintiff must have been a traveler. *Mobus v. Waitsfield*, 122.

Cannot be said as matter of law that the party here injured was not a traveler. *Ibid.*

Insufficiency of highway held to be proximate cause of injury. *Ibid.*

Damages on change of grade of. *Fairbanks et al. v. Rockingham*, 221.

In removing obstructions from highway, the selectmen may use necessary force. *Chase v. Watson et al.*, 385.

HUSBAND AND WIFE.

See MARRIED WOMAN. SUPPORT. WITNESS.

IGNORANCE.

No defense to a prosecution for killing a deer without horns. *State v. Ward*, 438.

INDICTMENT.

See COMPLAINT.

Necessary allegations in indictment for adultery. *State v. Bisbee*, 293.

INFORMATION.

May be amended by State's Attorney's successor in office. *State v. Barrell*, 202.

Need not be on oath of office. *Ibid.*

INSOLVENCY.

See ASSIGNEE IN INSOLVENCY.

Certain order of Court does not amount to an order of a dividend. *Needham v. Long's Estate*, 117.

INSTRUCTIONS.

When case does not show that evidence did not call for instruction excepted to, error does not appear. *Chase v. Watson et al.*, 385.

INSURANCE.

In an action on an accident insurance policy, want of due care on the part of the plaintiff must be specially pleaded. *Poole v. Mass. Mutual Accident Association*, 85.

Contract of mutual company is construed against the company. *Frink's Admr. v. Brotherhood Accident Co.*, 249.

The term "cattle tender" does not include a horse tender. *Ibid.*

Use of a certain steam engine vitiates fire policy. *Wilson v. Union Mutual Fire Insurance Co.*, 320.

The fact that such policy covers other engines is not material. *Ibid.*

INTERPLEADER.

One who is sued and trustee on account of the same fund cannot compel the two plaintiffs to interplead. *Hartford Life Insurance Co. v. Weed et al.*, 429.

That one of the suits is pending in another State does not affect the complainant's rights. *Ibid.*

Complainant here has not such an interest in the fund as will prevent it from maintaining the bill. *Montpelier v. Capital Savings Bank et al.*, 433.

One cannot compel others to interplead whose relative rights depend upon a question of fact to be settled between himself and one of the parties. *Ibid.*

That the complainant is a necessary party to a controversy touching the amount of the fund will prevent him from maintaining the bill. *Ibid.*

This objection is well taken by demurrer. *Ibid.*

INTOXICATING LIQUOR.

Sale of fermented cider is illegal. *State v. Thornburn*, 18.

INTOXICATION.

Alternative sentence for a second offense is to House of Correction. *In Re Rogers*, 329.

Costs may be imposed on second conviction for. *Ibid.*

JOINT TORT FEASORS.

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Release of one releases all. *Dufur v. Boston & Maine Railroad*, 185.

JUDGMENT.

Judgment of justice on evidence received is on the merits. *Wilkins v. Stiles et al.*, 42.

Judgment *non obstante* not rendered for defendant. *Davis v. Streeter*, 214. *Stoddard v. Cambridge Mutual Fire Insurance Co.*, 253.

Determination of board of civil authority on appeal from decision of listers is a final judgment. *Phillips v. Bancroft et al.*, 357.

Plaintiff who appears and gives judgment is entitled to an appeal. *Severance v. Elliott*, 421.

JURISDICTION.

That matters in issue are *res judicata* does not deprive justice of jurisdiction. *Wilkins v. Stiles et al.*, 42.

Commissioners in insolvency have no jurisdiction of claims created by assignee. *Sowles et al. v. Lewis et al.*, 59.

Referee appointed on appeal from commissioners in insolvency has no jurisdiction to review compromise by assignee. *Ibid.*

Such referee cannot decide question whether assignee may purchase and hold claim against the estate. *Ibid.*

Justice's jurisdiction so far as the question of title to land is concerned depends on the declaration. *Heath et al. v. Robinson*, 133.

Effect of raising *ad damnum* in County Court on appeal. *Ibid.*

Justice has no jurisdiction in trespass for cutting growing trees when *ad damnum* exceeds twenty dollars. *Ibid.*

Jurisdictional value in replevin is determined by certificate of officer. *Widder v. Benjamin*, 152.

Court cannot render judgment for a return of property replevied in an action of which it has no jurisdiction. *Ibid.*

Equity has jurisdiction over certain funds. *Hanks v. Hanks et al.*, 273.

Equity has no jurisdiction in suit to recover money held in trust. *Downs et al. v. Downs' Exr. et al.*, 383.

JURY.

Question what a certain statement, made by a witness out of court, indicates is for the jury. *In Re Hathaway's Will*, 137.

Request by jury to have evidence read is addressed to the discretion of the trial Court. *State v. Manning*, 185.

Character of possession is for the jury. *Jangraw v. Mee*, 211.

Relation which one assumes by signing note is for the jury. *Lyndon Savings Bank v. International Co. et al.*, 224.

Question of good faith of holder of note is for the jury. *Ibid.*

JUSTICE OF THE PEACE.

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Character of judgment rendered by. *Wilkins v. Stiles et al.*, 42. *Severance v. Elliott*, 421.

LEASE.

Contract in form of, held to be a conditional sale. *Nye v. Daniels*, 81.

Lease void for uncertainty of description. *Goodsell v. Rutland-Canadian R. R. Co.*, 375.

Inherently insufficient description in cannot be aided by parol. *Ibid.*

Possession of a part of a tract under a void lease will not be extended by construction. *Ibid.*

LEGISLATURE.

See CONSTITUTIONAL LAW. CURATIVE STATUTE.

Power to grant authority to railroad company. *Clarendon v. Rutland R. R. Co.*, 6.

Power to impose additional burden on such company. *Ibid.*

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See COMPLAINT.

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Possession taken under chattel mortgage does not amount to lien created by legal proceedings. *Thompson v. Fairbanks*, 361.

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LIMITATION.

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MARRIAGE.

The prohibition of New York Code does not apply to the re-marriage of a person divorced in this State. *State v. Bentley*, 163.

MARRIED WOMAN.

May hold gift from husband against subsequent creditors. *Fletcher v. Wakefield*, 257.

Equitable lien on property of. *Fletcher v. Brainerd*, 300.

Recognition of equitable rights by. *Ibid.*

MITTIMUS.

Person will not be released because of defective mittimus, but will be remanded that a new one may issue. *In Re Rogers*, 329.

MORTGAGE.

See CHATTEL MORTGAGE.

Mortgage given in preference affirmed by assignee in insolvency by suit for value of property. *Sowles et al. v. Lewis et al.*, 59.

Recital of debt in a mortgage is *prima facie* evidence of it. *Green et al v. McDonald et al.*, 93.

When superior to resulting trust. *Fonda v. Gibbs et al.*, 406.

Assignee of such mortgage entitled to priority, though he takes with notice of such trust. *Ibid.*

Priority of superior mortgage not affected by foreclosure of junior mortgage. *Haskell's Admr. v. Holt et al.*, 413.

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Record must show grounds of motion. *Terrill v. Tillison*, 193.

Properly overruled. *Fletcher v. Wakefield*, 257.

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NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE. EVIDENCE.

Town not liable for when acting in governmental capacity. *Stockwell v. Rutland*, 76.

NEW TRIAL.

Not granted on newly discovered evidence of unreliable witness. *State v. Manning*, 185.

Denied for insufficiency of new evidence. *Ibid.*

NOTICE.

Defense available without notice under County Court Rule 13. *Lyn-don Savings Bank v. International Co. et al.*, 224.

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ORDINANCE.

Certain ordinance against carrying concealed weapons, unconstitutional. *State v. Rosenthal*, 295.

OWNER.

Ownership necessary for posting lands against shooting, trapping and fishing. *Payne v. Sheets*, 335.

PAYMENT.

Indorsement in handwriting of payee is evidence of. *McDowell v. McDowell's Estate*, 401.

In the absence of evidence that creditor was in need, the fact that the debtor had money which the creditor knew of does not tend to prove payment. *Ibid.*

It was not error to refuse to charge that payment must have been made with intent to have it applied on the note. *Ibid.*

Expectation of payment, how rebutted. *Ibid.*

PEDLER'S LICENSE.

V. S. 4732 and 4733 are unconstitutional. *State v. Shedoi*, 277.

PENAL STATUTE.

V. S. 4626 is remedial, not penal. *Payne v. Sheets*, 335.

PERFORMANCE.

Excused by refusal to accept goods. *Davis v. Bowers Granite Co.*, 286.

PLEADING.

See COMMON COUNTS.

A defense which requires special plea cannot be relied upon though it appears from the evidence. *Poole v. Mass. Mutual Accident Association*, 85.

In an action on an accident policy, want of due care on the part of the insured must be pleaded. *Ibid.*

Permission to file plea in Supreme Court is not granted unless it appears that case has been tried as it would have been on such plea. *Ibid.*

Rejoinder held to be in avoidance. *Baker et al. v. Sherman et al.*, 88.

Sufficiency of plea in avoidance. *Ibid.*

Allegations sufficient in highway case. *Modus v. Waitsfield*, 122.

Contributory negligence precluded by allegations. *Ibid.*

Declaration charging joint tort. *Dufur v. B. & M. Railroad*, 165.

That a plea amounts to the general issue cannot be taken advantage of by general demurrer. *Ibid.*

Use of steam engine in violation of terms of fire insurance policy may be shown under a notice. *Wilson v. Union Mutual Fire Insurance Co.*, 320.

Petition under V. S. 2701 need not allege that wife is living apart from husband. *Ingram v. Ingram*, 392.

That complainant in bill of interpleader is a necessary party to any controversy touching the amount of the fund is ground of demurrer. *Montpelier v. Capital Savings Bank et al.*, 433.

At common law, a general count in assumpsit which discloses an express promise as the indispensable ground of recovery is demurrable. *Hersey v. Northern Assurance Co.*, 441.

General count on fire insurance policy, sufficient. *Ibid.*

No. 121, Acts of 1896, only provides for a simpler mode of declaring, and does not affect the substantive rights of the parties. *Ibid.*

This act does not change the rule as to the burden of proof, and is not unconstitutional. *Ibid.*

This declaration need not show that the required specification has been filed. *Ibid.*

That a count is bad for inconsistency in matters of substance is ground of demurrer. *Ibid.*

POLICE POWER.

Valid exercise of. *Clarendon v. Rutland R. R. Co.*, 6.

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Possession held to be permissive. *Hunter v. Emerson et al.*, 173.

Notice of claim not required by one in. *Jangraw v. Mee*, 211.

Character of is a question for the jury. *Ibid.*

Possession of part of a tract under a lease void for uncertainty of description cannot be extended by construction. *Goodsell v. Rutland-Canadian R. R. Co.*, 375.

POST-MASTER.

Cannot be compelled to testify to certain matters pertaining to the business of his office. *Nye v. Daniels*, 81.

PRACTICE AND PROCEDURE.

See AMENDMENT.

Right of surety to withdraw claim in insolvency and file new one. *Sowles et al. v. Lewis et al.*, 59.

Permission to file plea in Supreme Court, when granted. *Poole v. Mass. Mutual Accident Association*, 85.

PREFERENCE.

See MORTGAGE.

PRINCIPAL AND AGENT.

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PROBATE COURT.

Cannot grant relief by way of subrogation. *Wilder's Exrs. v. Wilder et al.*, 178.

Cannot, in this case, grant relief under V. S. 2494. *Ibid.*

PROHIBITION.

Does not lie to restrain proceedings under an erroneous judgment rendered by a Court having jurisdiction. *Wilkins v. Stiles et al.*, 42.

PROMISSORY NOTES.

See STATUTE OF LIMITATIONS.

Obtained by fraud is without consideration. *Terrill v. Tillison*, 193.

One sued as joint maker may show that he did not sign as such.

Lyndon Savings Bank v. International Co. et al., 224.

Corporation which receives avails of note cannot defend on the ground that it is not executed as required by its by-laws. *Ibid.*

Obligation assumed by one who puts his signature upon a note after its execution. *Ibid.*

Request by maker of other signers may be inferred. *Ibid.*

Memorandum on back or margin made at the time of its execution is a part of the note. *State v. Donovan*, 308.

PROXIMATE CAUSE.

Insufficiency of highway held to be. *Mobus v. Waitsfield*, 122.

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Property of private corporation used for supplying water to inhabitants of municipality is not appropriated to public use. *Godfrey v. Bennington Water Co.*, 350.

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See JURY.

RAILROADS.

Duty of company to maintain overhead crossing. *Clarendon v. Rutland R. R. Co.*, 6.

RAM.

Marking ram with a single initial of owner's name is not a compliance with V. S. 4799. *Severance v. Elliott*, 421.

RATIFICATION.

Certain finding is not a finding of ratification. *Green et al. v. McDonald et al.*, 93.

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See JURISDICTION.

Finding of referee construed. *Sowles et al. v. Lewis et al.*, 59.

Finding of, as bearing on question of estoppel. *Ibid.*

Finding sufficiently indicates intention as to basis of damages. *Ibid.*

Allowance by of item not on specification is not error, *Ibid.*

RELATIONSHIP.

Relationship alone does not rebut inference that labor was performed upon expectation of payment. *McDowell v. McDowell's Estate*, 401.

REMAINDER.

Will construed to create vested remainder. *Burton v. Provost et al.*, 199.

REMITTITUR.

Plaintiff may reduce verdict to sum declared for by. *Davis v. Bowers Granite Co.*, 286.

REPLEVIN.

Jurisdictional value determined by certificate of officer. *Widder v. Benjamin*, 152.

Court cannot render judgment for a return in an action of which it has no jurisdiction. *Ibid.*

REQUEST TO CHARGE.

A request inapplicable to the case is properly refused. *In Re Hathaway's Will*, 137.

A request unsupported by evidence properly refused. *Terrill v. Tillson*, 193.

When one alternative of a request is unsound, the whole may be disregarded. *Ibid.*

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Chase v. Watson et al., 385.

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On second conviction of intoxication, alternative sentence is to the House of Correction. *In Re Rogers*, 329.
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- V. S. 3358 (Change of grade of highways), *Fairbanks et al. v. Rockingham*, 221.
- V. S. 3490 (Injuries on highways), *Modus v. Waitsfield*, 122.
- V. S. 3510 (Removal of obstructions from highway), *Chase v. Watson et al.*, 385.

- V. S. 3846 (Railroad crossings), *Clarendon v. Rutland R. R. Co.*, 6.
V. S. 4460 (Fermented cider), *State v. Thornburn*, 18.
V. S. 4463 (Selling cider), *State v. Thornburn*, 18.
V. S. 4626 (Fishing, trapping, or hunting on posted lands), *Payne v. Sheets*, 335.
V. S. 4732, 4733 (Pedler's license), *State v. Shedroi*, 277.
V. S. 4799 (Marking ram), *Severence v. Elliott*, 421.
V. S. 4922, 4923, 4924 (Carrying weapons), *State v. Rosenthal*, 295.
V. S. 5206 (Alternative sentence), *In Re Rogers*, 329.
Const. ch. 1, art. 16 (Bearing arms), *State v. Rosenthal*, 295.

STEAM FARM ENGINE.

See INSURANCE.

SUBROGATION.

- Life tenant who pays encumbrance is entitled to. *Wilder's Exrx. v. Wilder et al.*, 178.
That such payment is made under misapprehension does not preclude this right. *Ibid.*
Probate Court cannot grant relief by. *Ibid.*

SUPPORT.

- Petition for need not allege that wife is living apart from husband. *Ingram v. Ingram*, 392.
On trial of such petition, a finding of facts in former divorce proceedings is not admissible. *Ibid.*

SURETY.

See PRACTICE AND PROCEDURE.

- Right to prove debt against insolvent estate. *Sowles et al. v. Lewis et. al.*, 59.

TAXATION.

- Property of private corporation used for supplying water to inhabitants of a municipality is taxable. *Godfrey v. Bennington Water Co.*, 350.
Abstract of individual lists must include real estate. *Ibid.*
The omission of real estate from this abstract cannot be cured by act of Legislature. *Ibid.*

TAXES.

See COLLECTION OF TAXES. TAXATION.

TITLE TO LAND.

See JURISDICTION. TRESPASS.

TOWNS.

See HIGHWAYS.

Not liable for injuries when acting in governmental capacity. *Stockwell v. Rutland*, 76.

Not liable in trespass for acts of tax collector. *Hunt v. Eden*, 119.

TRAVELER.

See HIGHWAYS.

TRESPASS.

See COLLECTOR OF TAXES.

In trespass for cutting down growing timber, title to land in necessarily involved. *Heath et al. v. Robinson*, 133.

Trespass is the proper form of action under V. S. 4626. *Payne v. Sheets*, 335.

TROVER.

Sale by conditional vendor of his interest is not a conversion. *Nye v. Daniels*, 81.

Taking possession by assignee of vendor, held not a conversion. *Ibid.*
Damages for conversion by mortgagee. *Davis v. Bowers Granite Co.*, 236.

Damages for conversion by conditional vendor. *Clark v. Clement*, 417.

TRUSTS.

See JURISDICTION.

Invalid deed of cemetery creates a trust. *Hunt et al. v. Tolles et al.*, 48.

Funds held in trust under the circumstances. *Sowles et al. v. Lewis et al.*, 59.

Implied trust arises at time of the conveyance. *Wilder's Exrs. v. Wilder et al.*, 178.

Mortgage superior to. *Fonda v. Gibbs et al.*, 406.

USE.

Meaning of the word in fire insurance policy. *Wilson v. Union Mutual Fire Insurance Co.*, 320.

VARIANCE.

Objection for must be raised below. *Brown's Est. v. Dunn's Estate*, 264.

In indictment for forgery. *State v. Donovan*, 308.

VENDOR'S LIEN.

See CONDITIONAL SALE.

VERDICT.

See MOTION FOR VERDICT.

Motion to set aside, addressed to discretion. *Jangraw v. Mee*, 211.

Plaintiff may remit to amount declared for. *Davis v. Bowers Granite Co.*, 286.

Certain defects in an indictment for adultery, not cured by. *State v. Bisbee*, 293.

Gross inadequacy of damages is a sufficient ground for setting aside. *Barrette v. Carr et al.*, 425.

WILLS.

See WITNESS.

Evidence admissible on question of due execution. *In Re Clafin's Will*, 19.

Attesting witness need not know character of instrument. *Ibid.*

Sufficient that witnesses were together so that they could see signing. *Ibid.*

Will established as originally executed, without regard to certain alterations. *In Re Knapen's Will*, 146.

Provision construed to create a vested remainder. *Burton v. Provost et al.*, 199.

WITNESS.

See CROSS-EXAMINATION. WILLS.

Postmaster cannot be compelled to testify to certain facts. *Nye v. Daniels*, 81.

Amateur photographer may testify if Court finds that he is competent. *McGovern v. Hays & Smith*, 104.

Wife of executor competent under the circumstances. *In Re Hathaway's Will*, 137.

When husband and wife are properly joined as parties to a contest over the establishment of a will, the wife may testify. *Ibid.*

In foreclosure by an administrator, defendant is not competent. *Haskell's Admr. v. Holt et al.*, 413.

Widow of decedent was competent, it not appearing that she testified to confidential matters. *Ibid.*

Ex. A, l. 8.
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